IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-154

WILSON H. ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND,
*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FRANCIS B. BURCH,
Attorney General
of Maryland,
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
ROBERT A. ZARNOCH,
Assistant Attorney General,
1400 One South Calvert Bldg.,
Baltimore, Maryland 21202,
Attorneys for Petitioner.

The Daily Record Co., Baltimore, Md. 21202

# INDEX

## TABLE OF CONTENTS

## TABLE OF CITATIONS

### *Cases*

***Statutes, Rules and Regulations***







***Miscellaneous***

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No.

WILSON H. ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND,
*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Wilson H. Elkins, President of the University of Maryland, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 28, 1977.

### OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fourth Circuit, not yet reported, appears in the Appendix to this Petition (A. 54a). The order denying rehearing en banc, entered May 23, 1977, is also unreported and likewise appears in the Appendix (A. 55a). The opinion and order of the United States District Court that resulted in the appeal to the Court of Appeals was entered on July 13, 1976, in *Moreno v.*

*University of Maryland*, 420 F. Supp. 541 (D. Md. 1976), and also appears in the Appendix (A. 8a).

## JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1977. Within the time prescribed by Rule 40 of the Federal Rules of Appellate Procedure, Petitioner filed a petition for rehearing and suggestion for rehearing en banc. That petition was denied by the Court of Appeals on May 23, 1977. This petition for certiorari is being filed within the 90 day period provided by 28 U.S.C. § 2101 and Rule 22 of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether the decisions below should have applied Supreme Court precedents on irrebuttable presumptions, disregarded the principles articulated in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and erroneously concluded that the University of Maryland's policy of denying in-state status for tuition and fee purposes to non-immigrants holding G-4 visas establishes an irrebuttable presumption violative of the due process clause of the fourteenth amendment to the United States Constitution?

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

### Constitution of the United States

**Amendment XIV, § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or



immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### United States Code

**Title 8, § 1101(a)(15)(G)(i) and (iv)**

The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

* * *

(G) (i) a designated principal resident representative of a foreign goverment recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669), accredited resident members of the staff of such representatives, and members of his or their immediate family;

* * *

(iv) officers, or employees of such international organizations, and the members of their immediate families;

**Title 8, § 1184(a)**

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248 [§ 1258 of this title], such alien will depart from the United States.

**Title 8, § 1202(c)**

(c) Every alien applying for a nonimmigrant visa and for alien registration shall make application therefor in such form and manner as shall be by regulations prescribed. In the application the alien shall state his full and true name, the date and place of birth, his nationality, the purpose and length of his intended stay in the United States; personal description (including height, complexion, color of hair and eyes, and marks of identification); his marital status; and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.

**Code of Federal Regulations**

**Title 8, § 214.1**

This appears in the Appendix (A. 5a).

**University of Maryland In-State Policy with Respect to Tuition and Fee Differentials—**

This also appears in the Appendix (A. 1a).

## STATEMENT OF THE CASE

Following the decision of this Court in *Vlandis v. Kline*, 412 U.S. 441 (1973), the Board of Regents of the University of Maryland adopted a new policy for the classification of students as "in-state" or "out-of-state" for purposes of determining admission, tuition rates, and charge differentials. Like most other public institutions of higher education, the University of Maryland bases its award of in-state status on domicile.

Because it views non-immigrant aliens as being under a legal disability which precludes the intent to be domiciled in Maryland, the University considers for in-state status only "United States citizens and . . . immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States." Even these individuals do not automatically



qualify for the preferential, in-state tuition and charge differential rates. The in-state policy describes eight non-exclusive indicia of domicile which are used to assist the University in determining a student's status.[1] (If the student himself is financially dependent on a parent, the University looks to the status of the parent rather than of the student in making the determination.) For students who are not United States citizens or permanent resident aliens (or are the dependent children of financially responsible parents holding similar non-immigrant status), the University does not further examine other domiciliary factors. This is because such individuals cannot have the requisite legal intent to establish Maryland domicile.[2] However, the University recognizes that aliens who are permanent resident aliens can establish domiciliary intent for in-state purposes. Thus, permanent resident aliens can and do qualify for the preferential rates on the same bases as United States citizens. The in-state policy denies preferential rates to *both* citizens who are not Maryland domiciliaries and to non-immigrants who, by definition, are not Maryland domiciliaries; it benefits citizens who are domiciled in Maryland, as well as permanent resident aliens who are Maryland domiciliaries. Thus, it is not directed at aliens per se and non-domiciliaries, not aliens, are the only class disadvantaged by the policy. *Compare Nyquist v. Mauclet*, ___ U.S. ___, 45 U.S.L.W. 4655 (June 13, 1977).

---

[1] Among the domiciliary criteria set out in the University's in-state policy are: presence, possession of personal and real property, motor vehicle registration, driver's license, voting, and income tax payments (A. 3a-4a).

[2] The in-state policy defines domicile as follows:

> "A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time . . ." (A. 3a).

Even non-immigrant students are not forever precluded by the University policy from qualifying for in-state status. A financially responsible parent who adjusts his status from non-immigrant to that of permanent resident aliens is no longer disabled from exhibiting the necessary domiciliary indicia. The same is true of a non-immigrant student who becomes financially independent for twelve months and who, like one of the Respondents (Juan Otero), adjusts his status to that of a permanent resident alien. Moreover, the University's three-step appellate process is available to such individuals both with respect to the effect of change in their immigration status and, subsequently, exhibition of domiciliary indicia.

On May 27, 1975, Respondents, undergraduate students at the University of Maryland, brought suit for declaratory and injunctive relief in the United States District Court for the District of Maryland against the University and its President, Dr. Wilson H. Elkins, alleging jurisdiction under 28 U.S.C. § 1343(3) and (4). These financially dependent students were non-immigrant aliens who held G-4 visas,[3] as did their

[3] A "G-4 alien" is one class of non-immigrants; it consists of aliens who are "officers, or employees of . . . international organizations . . . and the members of their immediate families." 8 U.S.C. § 1101(a)(15)(G)(iv). A G-4 non-immigrant is admitted to the United States "for such time and under such conditions as the Attorney General may be regulations prescribe." 8 U.S.C. § 1184(a).

Pursuant to the regulations for the admission of non-immigrant aliens into the United States, a non-immigrant such as the holder of a G-4 visa must agree "that he will abide by all the terms of and conditions of his admission or extension and that he will depart at the expiration of the period of his admission or extension or on abandonment of his authorized non-immigrant status." 8 C.F.R. § 214.1. In addition, an alien applying for a non-immigrant visa must state under oath on his application "the purpose and length of his intended stay in the United States." 8 U.S.C. § 1202(c). Thus, entitlement to G-4 non-immigrant status by a person and his family is derived from the circumstances of that



fathers, who were employed by certain international organizations based in Washington, D.C., *viz.*, the Inter-American Development Bank (IDB) and the International Bank for Reconstruction and Development (World Bank). In particular, the students challegned, as violative of the due process and equal protection clauses of the fourteenth amendment to the United States Constitution, the University's policy of denying in-state status for tuition and charge differential purposes to holders of G-4 visas or those who are financially dependent on persons holding such non-immigrant status.

Following a hearing on April 9, 1976, the district court, on July 13, 1976, held that the University's in-state policy as applied to G-4 aliens created an impermissible irrebuttable presumption in violation of the due process clause of the fourteenth amendment. The court said that by the use of a presumption of non-domicile for G-4 aliens, the University denied Respondents the opportunity to demonstrate that they were entitled to in-state status for purposes of tuition and charge differentials. Relying on *Vlandis v. Kline, supra; Stanley v. Illinois,* 405 U.S. 645 (1972); and *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), the court held that this irrebuttable presumption of non-domicile, because it was not (according to the court) universally true and because the University had a

alien's employment with an international organization, and such status with its attendant permission to remain in the United States would terminate at any time that the employment with an international organization ceases.

Under federal law, employees of the IDB and the World Bank who hold G-4 visas are the beneficiaries of various privileges and immunities, including exemption from federal and state income tax levies. Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 502; Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; 22 U.S.C. § 288(d); 26 U.S.C. § 893(a).

reasonable alternative means of making a domicile determination for holders of G-4 visas (*viz.*, the appeals process), could not be justified on the basis of cost equalization or administrative convenience. Ignored by the court was any discussion of or reference to *Weinberger v. Salfi,* 422 U.S. 749 (1975), which cut back sharply on the application of the cited cases;[4] nor did the court attempt to apply the principles of *Salfi* or to distinguish the present case from *Vlandis*. Because the district court decided the case on due process grounds, it did not rule on the students' equal protection or supremacy clause claims. The court enjoined the University's President (the University itself was dismissed as a party) from denying Respondents and members of their class in-state status "solely because they or their parents" hold G-4 visas.[5]

On July 31, 1976, an appeal was noted. Before the Fourth Circuit, Petitioner contended that the principles of *Salfi* and subsequent "irrebuttable presumption" decisions of this Court warranted reversal. Nevertheless, in a per curiam opinion, dated April 28, 1977, the Fourth Circuit affirmed the district court, eschewed any discussion of or reference to *Salfi* and its progeny, and in effect adopted the opinion of the district court. A timely petition for rehearing by the full court was filed, and denied on May 23, 1977. On May 26, 1977, upon Petitioner's motion, the Fourth Circuit stayed its mandate pending application to this Court for a writ of certiorari (A. 56a).

---

[4] Neither party called the case to the attention of the district court.

[5] On August 3, 1976, in response to Petitioner's motion, the district court stayed those portions of its final order which granted declatory and injunctive relief (A. 52a).



## REASONS FOR GRANTING THE WRIT

### I.

**THE TREATMENT BELOW OF THE IRREBUTTABLE PRESUMPTION QUESTION RAISED IN THIS CASE IS PATENTLY AT ODDS WITH A SERIES OF DECISIONS BY THIS COURT AND SHARPLY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.**

Petitioner submits that the opinion filed by the Court of Appeals, as well as the district court view it adopts on the irrebuttable presumption doctrine, is flatly contradicted by what is fast becoming a long line of decisions by this Court and conflicts with conclusions reached in at least three other circuits.

The decisions below hold that decisions of this Court mandate that every irrebuttable presumption not universally true in fact is unconstitutional (A. 41a). Applying this now discredited principle (*see Weinberger v. Salfi,* 422 U.S. 749, 781 (1975); The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 78 (1975)), the district court opinion adopted by the Fourth Circuit concluded that neither the Maryland law of domicile nor United States immigration law precluded a G-4 alien from acquiring a state domicile. Hence, according to its reasoning, the University, although perhaps correct in its interpretation of the law of domicile with respect to other categories of non-immigrants, had adopted a not universally true or invalid measure of domicile with respect to G-4's. In arriving at this conclusion, the opinion relied on three cases to support its view that the application of the University's in-state policy to G-4 aliens created an unconstitutional irrebuttable presumption: *Vlandis v. Kline,* 412 U.S. 441 (1973); *Stanley v. Illinois,* 405 U.S. 645 (1972); and *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974).

In *Vlandis,* in a deeply split decision, this Court held that a "permanent" irrebuttable presumption of nonresidence was created by a Connecticut policy which

established that an out-of-state applicant for admission to a public college could not adjust to in-state status *for the entire period of his attendance at the school,* when that presumption was not universally true in fact. The *Vlandis* opinion carefully distinguished prior cases relating to in-state/out-of-state tuition differentials, most particularly, *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd.* 401 U.S. 985 (1971). *Starns* upheld Minnesota's requirement that no student is eligible for in-state status for tuition purposes unless he has been a bona fide domiciliary of the state for at least one year. The *Vlandis* court noted that under this scheme the presumption of non-residency was temporary and that the student could rebut it after having lived in the state one year, by presenting other sufficient evidence to show bona fide domicile within the state. 412 U.S. at 452. In *Stanley,* this Court struck down an administrative presumption that an unwed father was unfit to have custody of his children, and in *LaFleur* it held that a Board of Education rule presuming maternal incapacity for a set period during pregnancy and after childbirth created an unconstitutionally impermissible irrebuttable presumption.

Just as many lower courts did up to 1975,[6] the lower courts in the instant case read these three cases to stand for the proposition that any legislative or administrative classification that could be stated in the form of a presumption was unconstitutional if the presumption was not universally or necessarily true. Under such a rule, the lower courts felt under no constraint to limit *Vlandis* to its facts, to recognize that the presumption at issue in this case was not "permanent" like the one condemned in *Vlandis,* or to distinguish *LaFleur* or *Stanley* as involving classifications affecting fundamental rights.

[6] *See, e.g.,* Salfi v. Weinberger, 373 F. Supp. 961, 965 (N.D. Cal. 1974), *rev'd,* 422 U.S. 749 (1975); Hein v. Burns, 402 F. Supp. 398 (S.D. Iowa 1975), *rev'd,* 50 L. Ed. 2d 485 (1977).



Even at its zenith the irrebuttable presumption doctrine was never able to command more than a fragile majority of this Court's justices and met with the near universal condemnation of commentators[7] who contended that the doctrine was merely an excuse to apply "strict scrutiny" equal protection analysis.

Finally, in 1975, in *Weinberger v. Salfi, supra,* this Court sharply and properly curtailed the application of the irrebuttable presumption doctrine. *Salfi* involved a challenge to a Social Security Act provision which limited eligibility for survivors' benefits to persons whose relationship with the insured began at least nine months before his death. The plaintiffs contended that the nine-month duration-of-relationship requirement created an impermissible irrebuttable presumption that short-lived marriages were a sham aimed at obtaining benefits and that the plaintiffs should be given an opportunity to demonstrate the bona fide nature of their relationship with the insured. The trial court, like the lower court in the present case, felt it was unnecessary to demonstrate how *Vlandis, LaFleur,* and *Stanley* applied to the challenged statute. Instead, the district court in *Salfi* merely asserted that these decisions mandated the invalidation of every legislative presumption that was not universally or necessarily true in fact. *Salfi v. Weinberger, supra;* 89 Harv. L. Rev. at 78 n.16.

However, on appeal, this Court rejected such a superficial analysis. *Stanley* and *LaFleur* were distinguished on the grounds that they involved *basic* civil

[7] Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974); Note, The Conclusive Presumption Doctrine: Equal Process or Due Protection?, 72 Mich. L. Rev. 800 (1974); Note, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449 (1975).

rights and due process liberties, such as the right to raise one's children and the right to personal choice in matters of marriage and family life. 422 U.S. 771.[8] Rather than relying on anything said in *Vlandis*, the Court based its decision on *Starns:*

> "As in *Starns v. Malkerson*, . . . the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns*, appellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test." *Id.* at 772 (citation omitted).

Most significantly, the fact that the "presumption" at issue was not universally true did not aid the plaintiffs' case:

> "[U]ndoubtedly [the statute] excludes some surviving wives who married with no anticipation of shortly becoming widows, and it may be that appellee Salfi is among them . . . .
>
> "While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham arrangements, we think it clear that Congress could rationally choose to adopt such a course." *Id.* at 781.

---

[8] In Turner v. Department of Employment Security, U.S. , 46 L. Ed. 2d 181 (1975), a case decided after *Salfi*, this Court in a per curiam opinion struck down a Utah law creating a presumption of maternal incapacity "virtually identical to the presumption found unconstitutional" in *LaFleur*. However, the Court was careful to adopt the limitations on the irrebuttable presumption doctrine set out in *Salfi*. ("The Fourteenth Amendment requires that . . . [states] must achieve legitimate state ends through more individualized means *when basic human liberties are at stake*." 46 L. Ed. 2d at 184 (emphasis added).



Finally, sounding the death knell for any expansion of the irrebuttable presumption doctrine, this Court said:

> "We think that the District Court's extension of the holdings of Stanley, Vlandis and LaFleur to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." *Id.* at 772.

And *Salfi* was just the beginning of what is now a long line of this Court's cases that refuse to apply *Vlandis* and its progeny, or reverse decisions which applied the doctrine in the fashion of the district court opinion adopted by the Fourth Circuit here.

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court overturned the decision of a three-judge federal court that *Vlandis* and *Stanley* mandated the unconstitutionality of a statutory irrebuttable presumption of total disability for miners due to black lung disease based on clinical evidence of a complicated stage of the disease. In so doing, the Court relied on *Salfi* and noted that the mere fact that the statute was phrased in terms of an irrebuttable presumption would not invalidate the statute "when its operation and effect are completely permissible." 49 L. Ed. 2d at 771.

In *Knebel v. Hein,* U.S. , 50 L. Ed. 2d 485 (1977), the Court overturned a three-judge court's determination that a federal food stamp regulation that disallowed a deduction for transportation expenses in connection with job training for purposes of computing a recipient's income was unconstitutional as violative of the irrebuttable presumption doctrine. Although the Court noted that "the District Court was correct that the regulations operate somewhat unfairly in appellee's case," it stated that they did not embody an irrebuttable presumption. 50 L. Ed. 2d at 491.

In *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of substantial federal question*, U.S. , 52 L. Ed. 2d 352 (1977), the Court summarily disposed of a resident alien's contention that a state ban against voting by aliens created an irrebuttable presumption.

And in *Fiallo v. Bell*, U.S. , 52 L. Ed. 2d 50 (1977) the Court rejected an irrebuttable presumption challenge to a federal statute that granted preferential immigration status to unwed fathers and their illegitimate offspring who were permanent resident aliens but not to non-immigrants, despite the obvious fact that the challenged classification, like those at issue in *Stanley* and *LaFleur*, affected fundamental freedoms of choice in matters of marriage and family life.

Other circuit courts of appeals were quick to perceive that the irrebuttable presumption doctrine was on the descendancy. In *Mogle v. Seiver County School Dist.*, 540 F.2d 478 (10th Cir. 1976), *cert. denied*, U.S. , 51 L. Ed. 2d 572 (1977), the Tenth Circuit, in reliance upon *Salfi*, held that in a case challenging a residency requirement for teachers, "we do not feel the conclusive presumption doctrine was intended to apply. The Supreme Court has disapproved extention of the doctrine which would make it destructive of numerous legislative judgments drawing lines." 540 F. 2d at 485. In *Sellers v. Ciccone*, 530 F.2d 199 (8th Cir. 1976), the Eighth Circuit upheld the exclusion of long-term inmates from prison training programs, primarily on the basis of *Salfi*. 530 F.2d at 202. And in *Fisher v. Secretary of HEW*, 522 F.2d 493 (7th Cir. 1975), the Seventh Circuit upheld the validity of Social Security Act presumptions with respect to coverage of domestic servants, stating:

> "As noted by Mr. Justice Rehnquist in his dissent in *LaFleur*, almost any law could be in some sense characterized as an irrebuttable presumption. In the normal case, well established standards of equal protection and due process should be applied to determine the validity of a Congressional enactment. It is only an unusual case where a statute will be declared invalid because of an improper irrebuttable presumption, and the same result would not be reached applying normal equal protection and due process standards." *Id.* at 504



This wealth of authority was ignored by the Fourth Circuit.[9]

Petitioner does not contend that the irrebuttable presumption doctrine has been officially overruled; nor does it ask the Court to do so at the present time, unless the Court deems it appropriate to a decision in favor of Petitioner in this case.[10] He argues principally that *this* is not the "unusual case" warranting the rigid and mechanistic application of the doctrine.

Basic human liberties and fundamental constitutional rights are not at stake in this case. Public education is not a right secured by the United States Constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Starns v. Malkerson*, *supra* at 238. And state regulation of entitlement to education falls in the category of the social welfare legislation reviewed in *Salfi*. Thus, contrary to the holding of the lower courts, *LaFleur* and *Stanley* have no application here.

---

[9] The Third Circuit has joined the Fourth Circuit in perpetuating a faulty analysis of irrebuttable presumptions. In *Gurmankin v. Costanzo*, 45 U.S.L.W. 2526 (3d Cir., Apr. 25, 1977), it applied *LaFleur* to a case where no "constitutional right was involved" and rejected *Salfi* as applying only in government benefit cases.

[10] This Court may very well conclude that under *Salfi* and its progeny the irrebuttable presumption doctrine no longer has any force except, perhaps, where a classification affecting fundamental constitutional rights is involved.

Secondly, the classification at issue in this case, even assuming it is regarded as a presumption, does not fall within the prohibitions of *Vlandis,* because it is not permanent. Unlike the students in *Vlandis,* who could never qualify for in-state status, Respondents in this case do have the opportunity to qualify. If their parents alter their status to that of a permanent resident alien *or* if the students similarly alter their status and become financially independent, Respondents will be able to qualify for in-state status on the same basis as all other persons who may be domiciled in Maryland. Like the plaintiffs in *Starns*, who after one year of disability could present evidence of domiciliary intent, the students in this case, after they or their parents alter their immigration status to that of permanent resident alien, can present evidence of domiciliary intent necessary to qualify for in-state status. Nor can it be said that the University's in-state policy speaks in terms of domicile but signifies otherwise in the case on non-immigrants — no more than Minnesota's policy in Starns of establishing a one-year restriction on demonstrating domicile can be said to be an unconstitutional "invalid measure of domicile" because a respectable body of law holds that physical presence for a moment in a particular place may be enough to establish domicile. *See White v. Tennant,* 31 W. Va. 790, 8 S.E. 596 (1888); *Winans v. Winans,* 205 Mass. 388, 91 N.E. 394 (1910); M. Jacobs, *Law of Domicile,* § 134 (1887). However, even if Respondents in this case may in fact be Maryland domiciliaries, like the out-of-state students in *tarns* who may have been domiciliaries before the lapse of one year or the widow in *Salfi* who may have entered into a bona fide marriage without regard to obtaining Social Security benefits, it is clear that *Salfi* does not require that the allegedly presumed fact be true in every case.



Thirdly, the interests asserted by Petitioner in support of the challenged in-state policy are entirely sufficient in light of the mere rational basis required by *Salfi.* The line drawn by the University between permanent resident aliens and non-immigrants is identical to that sustained by this Court in *Matthews v. Diaz.* 426 U.S. 67 (1976). In *Diaz,* the Court upheld a scheme which *denied* Medicare benefits to non-immigrants, but offered them to citizens and permanent resident aliens (the very same class potentially *benefited* in the instant case) on the rational basis that the amount of Medicare benefits was not limitless and that Congress could draw the line at citizens and permanent resident aliens because as a class they could be expected to have a greater affinity to the United States. Lest this case be distinguished as one involving the federal government's plenary control over aliens, the Court in *Diaz* noted that the only reason state exclusion of some aliens from benefits could not be justified is because the states invariably treated out-of-staters and aliens differently. Such a defect is not present in the University's in-state policy. Both out-of-staters and non-immigrants are denied in-state status. For these same reasons, *Nyquist v. Mauclet,* U.S. , 45 U.S.L.W. 4656 (June 13, 1977), is inapplicable. There, a five-Justice majority of this Court applied a strict scrutiny equal protection analysis to strike down a state educational benefits scheme which *denied* assistance to permanent resident aliens. In so doing, the majority of the Court noted that the statute was "directed at aliens and . . . only aliens are harmed by it." 45 U.S.L.W. at 4657. On the contrary, the University's in-state policy *benefits* the precise class disadvantaged in *Mauclet* and is directed at and disadvantages only non-domiciliaries, a class which includes some United States citizens as well as some aliens.

The limitation of governmental expenditures to those with a greater affinity, a theory which supported the

classifications at issue in *Diaz* and *Starns,* was the primary rationale proffered by the University in support of its in-state policy. In *Diaz,* this Court noted the reasonableness of the presumption said to be at issue here, the difficulty of line-drawing for purposes of entitlement to government benefits, and the obvious fact that "some persons who have an almost equally strong claim to favored treatment" are placed on different sides of the line. 426 U.S. at 83. Citing *Salfi* and *Dandridge v. Williams,* 397 U.S. 471 (1970), this Court said, "When this kind of policy choice must be made, we are especially reluctant to question the exercise of Congressional judgment." 426 U.S. at 84. It is this kind of rational judgment which the lower courts struck down in the present case.

As further justification for the challenged feature of the in-state policy, Petitioner points to the administrative difficulties attendant to affording full blown hearings on domiciliary indicia (many with interpreters) to non-immigrants,[11] and the prevention of disparate treatment among classes of non-immigrants. *See Knebel v. Hein, supra,* 50 L. Ed. at 492.[12]

[11] Of course, the University has afforded hearings to non-immigrants on the "objective criterion," *Weinberger v. Salfi,* 422 U.S. at 772, of whether or not they have adjusted their status to permanent resident alien.

[12] Respondents below argued that of all the categories of non-immigrants, G-4's alone were not legally precluded from establishing a Maryland domicile. To recognize such a position and elevate it to constitutional dimensions, would mean that perhaps the wealthiest and most privileged categories of non-immigrants would be given more advantage at the University's expense over the less affluent non-immigrant citizens, e.g., the holders of student visas. *See* Senate Report No. 94-1009, Foreign Assistance and Related Programs Appropriation Bill, 1977 (94th Congress 2d Session) at 10405; and "University of Maryland — Possible Adjustments of Tuition and Other Charges," Annex No. 1 to Petitioner's reply brief in the Fourth Circuit, which indicates that World Bank employees are reimbursed for tuition proposals made to the University on behalf of their children.



In summary, Petitioner contends that the decisions below improperly permitted the irrebuttable presumption doctrine to become an "engine of destruction" for a rationally based classification, *Weinberger v. Salfi, supra* at 772, that the lower courts should never have required the challenged feature of the University's in-state policy to be "universally true in fact," and that review by this Court is necessary because the lower court decisions sharply conflict with opinions of this Court and of other courts of appeals.

## II.

### THE DECISIONS BELOW CAST A CLOUD ON THE TUITION AND FEE POLICIES FOLLOWED BY MOST PUBLIC COLLEGES AND UNIVERSITIES IN THE UNITED STATES, AND THE ERRONEOUS INTERPRETATION OF UNITED STATES IMMIGRATION LAWS BY THE LOWER COURTS MAY SERIOUSLY IMPACT ON LEGITIMATE AREAS OF FEDERAL CONCERN SUCH AS FEDERAL ESTATE TAX LAW.

The dividing line adopted by the University of Maryland in its in-state tuition and fee policy between permanent resident aliens and non-immigrants is one adopted by most public colleges and universities in the United States. Most of these schools, like Maryland, have conlcuded that non-immigrants, who have decided not to become permanent resident aliens, are legally precluded from acquiring a domicile in their respective jurisdictions.[13] Moreover, this seemingly rational conclusion was echoed by this Court in *Nyquist v. Mauclet, supra,* when it noted:

> "Since many aliens, such as those here on student visas, may be precluded by federal law

[13] The definition of domicile under Maryland law as the "place where a man has his true, fixed, permanent home," *Shenton v. Abbott,* 178 Md. 526, 15 A.2d 906, 908 (1940), and as "residence at a particular place accompanied by positive or presumptive proof of the intention to remain there for an unlimited time," *Brafman v. Brafman,* 144 Md. 413, 414, 125 A. 161 (1924), would by its terms seem to preclude those who are not permanent resident aliens from acquiring domicile.

> from establishing a permanent residence in this country, see, e.g., 8 U.S.C. § 1101(a)(15)(F)(i); 22 C.F.R. § 41.45 (1976), the bar . . . [presented by the New York statute] . . . is of practical significance only to resident aliens." 45 U.S.L.W. at 4656.

However, the lower courts here have abandoned the natural import of the law of domicile and the plain meaning of various provisions in the immigration law and regulations,[14] to conclude that it is not universally true in fact that G-4's cannot acquire a state domicile. The effect of this ruling cannot be minimized. The Fourth Circuit's blurring of the in-state/out-of-state dividing line can only have an adverse effect on the tuition and fee policies of already financially strapped public institutions of higher education. In addition, the decisions below may affect federal tax law. The Internal Revenue Service has held that the non-domiciliary rate should be applied to the estates of G-4 aliens, reasoning that:

> "The acceptance by the decedent of the prescribed terms for his admission to and stay in the United States, as required by Federal law and regulations relating to immigration and nationality, created a legal disability that rendered him incapable of forming the intention necessary for the establishment of a domicile here, as required by section 20.0-1 of the Estate Tax Regulations. This legal disability continued to exist until the time of decedent's death since he was still in the United States as an employee of an international organization holding a G-4 visa." *Rev. Rul.* 74-364, 1974-2 C.B. 321.

The decisions below, in effect, have held that the IRS is incorrect.

Although Respondents sought to minimize below the effect of the district court's overemphasis on the absence in the immigration law of a requirement that a G-4 visa holder "not abandon his homeland," *compare*

[14] See pp. 6-7, supra.



8 U.S.C. §1101(a)(15)(F) *with* §1101(a)(15)(G)(iv), nothing can disguise the hole in the court's analysis. The framers of 8 U.S.C. § 1101 found no need to spell out the requirements of non-abandonment of homeland for non-immigrants who were obviously destined for a temporary stay in the United States keyed to their employment. Under the lower courts' superficial analysis of 1101(a)(15), diplomats (A), foreign press (I), alien crewmen (D), and even aliens in transit (C), are not prevented from obtaining a domicile in the United States. Petitioner suggests that such a reading is potentially limitless both in theory and in costs to public colleges and universities, not to say to the federal fisc.

## CONCLUSION

In summary, Petitioner submits that review should be granted to lay to rest a fundamental misapplication of the irrebuttable presumption doctrine (and that doctrine too if need be). The lower courts read that doctrine to mean that even if the University was generally and nearly universally correct in its legal interpretation of federal law and the law of domicile, it was constitutionally wrong. According to the decisions below, the doctrine still demands absolute perfection on the part of state classifications. Review is also warranted to rectify a fundamental misreading of federal law which may seriously impact on the fiscal affairs of public colleges and universities, as well as those of the federal government.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
ROBERT A. ZARNOCH,
Assistant Attorney General,
1400 One South Calvert Bldg.,
Baltimore, Maryland 21202,
Attorneys for Petitioner.



## APPENDIX

### UNIVERSITY OF MARYLAND
### DETERMINATION OF IN-STATE STATUS FOR ADMISSION, TUITION, AND CHARGE-DIFFERENTIAL PURPOSES[1]

An initial determination of in-state status for admission, tuition, and charge-differential purposes will be made by the University at the time a student's application for admission is under consideration. The determination made at that time, and any determination made thereafter, shall prevail in each semester until the determination is successfully challenged prior to the last day available for registration for the forthcoming semester. A determination regarding in-state status may be changed for any subsequent semester if circumstances, as later defined, warrant redetermination.

In those instances where an entering class size is established and where an application deadline is stated, in-state conditions for admissions must be satisfied as of the announced closing application date.

*General Policy*

1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

   a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

[1] Draft of August 31, 1973 as amended on September 7, 1973. Approved by the Board of Regents on September 21, 1973 to become effective with any term of the University beginning on or after January 1, 1974.

b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester.

c. Where a student is the spouse or a dependent child of a full-time employee of the University.

d. Where a student who is a member of the Armed Forces of the United States is stationed on active duty in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester, unless such student has been assigned for educational purposes to attend the University of Maryland.

e. Where a student is a full-time employee of the University of Maryland.

2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge-differential purposes in all other cases.

3. Each campus of the University will be responsible for making the in-state determination for the prospective or enrolled student.

4. In-state status is lost at any time a financially independent student establishes a domicile outside the State of Maryland. If the parent(s) or other persons through whom the student has attained in-state status establishes a domicile in another state, the student shall be assessed out-of-state tuition and charges six months after the out-of-state move occurs.

5. The terms of this policy will not be applied retroactively.

*Definitions*

1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person.



Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

2. A parent includes a natural parent, an adoptive parent, a legally-appointed guardian, and a person who stands *in loco parentis* to the student.

3. A spouse is a partner in a legally contracted marriage.

4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time.

5. The masculine gender of personal pronouns includes the feminine gender.

*Application*

1. A student requesting redetermination to in-state status who asserts that he is *financially dependent* upon a parent(s) or spouse domiciled in Maryland, as previously defined, will be required to produce by affidavit, in addition to other proof, documentation of the student's earnings for the year immediately preceding the last day of registration for the semester for which the determination is requested. Such documentation shall include relevant income tax returns, statements from employers, and/or federal and state withholding forms. An affidavit showing all expenses of the student for the same period must also be submitted.

2. A student requesting redetermination to in-state status who asserts that he is *financially independent* will be required to present by affidavit documentation cited in paragraph 1.

3. In determining domicile, the University shall take into consideration, but shall not be limited to, the following criteria as they pertain to the individual case:

a. Own or rent and occupy real property in Maryland as one's domicile on a year-around basis.

b. Maintain a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintain within the State of Maryland all or substantially all personal possessions.

d. Pay Maryland income tax on all earned income including all taxable income earned outside the State.

e. Register all owned motor vehicles in Maryland.

f. Possess a valid Maryland driver's license, if licensed.

g. Register to vote in Maryland, if registered.

h. Give a Maryland home address on federal and state income tax forms.

*N.B.* The documentation offered in these instances may be required to be in affidavit form.

*Appeals*

A student who disagrees with his classification may request a personal interview with a campus classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee (IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final.

*Implementation*

The implementation of this new policy to those eligible for redetermination will require an extended



period of time. It is hoped that a decision in each case will be made within ninety (90) days of a request for redetermination. During this period of time, or any further period of time required by the University, fees and charges based on the previous determination must be paid. If the determination is changed, any excess fees and charges will be refunded.

* * * * * *

NOTE: The deadline for meeting all requirements for an in-state status and for submitting all documents for reclassification is the last day of late registration for the semester the student wishes to be classified as an in-state student.

---

## CODE OF FEDERAL REGULATIONS

### Title 8, §214.1 Requirements for admission, extension, and maintenance of status.

(a) *General.* Every nonimmigrant alien applicant for admission or extension of stay in the United States shall establish that he is admissible to the United States or that a ground of inadmissibility has been waived under section 212(d)(3) of the Act; present a passport upon admission and only when requested in connection with an extension of stay, valid for the period set forth in section 212(a)(26) of the Act, except as otherwise provided in this chapter, and, upon admission, a valid visa, except when either or both documents have been waived; agree that he will abide by all the terms and conditions of his admission or extension, and that he will depart at the expiration of the period of his admission or extension or on abandonment of his authorized nonimmigrant status, and post a bond on Form I-352 in the sum of not less than $500 if required by the district director, special inquiry officer, or the Board of Immigration Appeals at the time of admission or extension, to insure the maintenance of the alien's nonimmigrant status and his departure from the United States. A nonimmigrant whose visa has been automatically revalidated pursuant to 22 CFR 41.125(f) shall, if otherwise admissible, be readmitted for a period not to exceed the unexpired

period of his initial admission or extension of stay which had been authorized by the Service prior to his departure to foreign contiguous territory or adjacent islands, as endorsed by the Service on the Form I-94 issued in connection with the returning nonimmigrant's prior admission or stay and presented by him, or as endorsed by the issuing school official or program sponsor on Form I-20 or DSP-66 presented by a returning nonimmigrant as defined in paragraph (F) or (J) of section 101(a)(15) of the Act. A nonimmigrant other than one in the classes defined in section 101(a)(15)(A) (i) or (ii) or (G) (i), (ii), (iii), or (iv) of the Act (members of which classes are not required to obtain extensions of stay if they continue to be so recognized by the Secretary of State as members of such classes); section 101(a)(15)(B) who is visiting the United States temporarily for pleasure and section 101(a)(15) (C), (D), or (K) of the Act (members of which classes are ineligible for extensions of stay); or section 101(a)(15) (F) or (J) of the Act, and whose period of admission has not expired, shall apply on Form I-539 and may be granted or denied, without appeal, an extension of his period of temporary admission by an officer in charge of a suboffice or a district director. A separate application must be executed and submitted for each alien seeking an extension of temporary stay; however, regardless of whether they accompanied the applicant to the United States, the spouse and minor, unmarried children of any applicant who have the same nonimmigrant classification may be included in his application and may be granted the same extension without fee. If failure to file a timely application is found to be excusable, an extension may be granted from the time of expiration of authorized stay. When because of reasons beyond his control, or special circumstances, an alien needs an additional period of less than 30 days beyond his authorized stay within which to effect his departure, he may be granted such time without filing an application for extension. Extensions to members of a family group shall be for the same period; if one



member is eligible for only a six-month extension and another for a twelve-month extension, the shorter period shall govern. For procedures relating to cancellation or breaching of bonds, see Part 103 of this chapter.

(b) *Termination of status.* Within the period of initial admission or extension of stay, the nonimmigrant status of an alien shall be terminated by the revocation of a waiver previously authorized in his behalf under section 212(d) (3) or (4) of the Act; or by the introduction of a private bill to confer permanent resident status on such alien.

(c) *Employment.* A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure, or section 101(a)(15)(C) of the Act as an alien in transit through this country, may not engage in any employment. Any other nonimmigrant in the United States may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the provisions of this chapter. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(9) of the Act.

OPINION
(Filed July 13, 1976)

---

*United States District Court,*
*D. Maryland.*

---

*Civ. A. No. M-75-691*

---

*Juan Carlos Moreno et al.,*
*Plaintiffs,*

*v.*

*University of Maryland and*
*Dr. Wilson H. Elkins, President,*
*University of Maryland,*
*Defendants.*

*(420 F. Supp. 541)*

---

JAMES R. MILLER, Jr., District Judge.

*Opinion and Order*

This is a purported class action suit in which the named plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, seek declaratory and injunctive relief against the defendants, the University of Maryland and Dr. Wilson H. Elkins, its president. Both sides have filed motions for summary judgment. The named plaintiffs are currently students at the University of Maryland, College Park campus, who reside in the State of Maryland with their parents, upon whom they are financially dependent. Plaintiffs' fathers all hold nonimmigrant alien visas issued pursuant to 8 U.S.C.A. § 1101(a)(15)(G)(iv)[1] [G-4 visas].

[1] Title 8, U.S.C., § 1101(a)(15)(G)(iv) defines as one class of non-immigrant alien those aliens who are "officers, or employees of such international organizations [those entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669)], and the members of their immediate families."



As employees of certain international organizations created under international agreements to which the United States is a party, the plaintiffs' fathers are exempted from state and federal taxes on salaries paid by these organizations.[2]

Under policies adopted by the Board of Regents of the University of Maryland effective for any term of the University beginning on or after January 1, 1974, (hereinafter referred to as the "In-State Policy"), students are divided into two classes, i.e., "in-state" or resident on the one hand and "out-of-state" or non-resident on the other, for purposes of determining admission, tuition rates, and charge differentials. Under this policy "out-of-state" undergraduate students are required to pay $1,260 more per year for tuition than "resident" students, as well as $100 more per year for a room. "Out-of-state" graduate students are charged $30 more per credit hour than "in-state" students.

The relevant sections of the "In-State-Policy" are as follows:

> *"General Policy*
>
> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to *immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States,* in the following cases:

[2] *See* Art. VII, § 9(b) of the Articles of Agreement of the International Bank for Reconstruction and Development (12/27/45), 60 Stat. 1440, T.I.A.S. No. 1502, as amended Dec. 16, 1965, 16 U.S.T. 1942, T.I.A.S. No. 5929 and Art. XI § 9(b) of the Agreement Establishing the Inter-American Development Bank, (4/8/59), 10 U.S.T. 3029, T.I.A.S. No. 4397. Plaintiff Clare Hogg's father is employed by the former organization usually referred to as the World Bank; the fathers of the other two named plaintiffs are employed by the latter organization.

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester. (Emphasis added).

* * * * * *

"2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge differential purposes in all other cases.

* * * * * *

"*Definitions*

"1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

* * * * * *

"4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time. . . . "

There are eight criteria which under the "In-State-Policy" "the University shall take into consideration, but shall not be limited to . . ." in determining whether Maryland domicile has been established. These criteria, applied to the individual upon whom the determination of domicile depends, are whether the individual:



a. Owns or rents and occupies real property in Maryland as his (her) domicile on a year-round basis.

b. Maintains a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintains within the State of Maryland all or substantially all personal possessions.

d. *Pays Maryland income tax on all earned income* including taxable income earned outside the State.

e. Registers all owned motor vehicles in Maryland.

f. Possesses a valid Maryland driver's license, if licensed.

g. Registers to vote in Maryland, if registered.

h. Gives a Maryland home address on federal and state income tax forms.

(Attachment to Defendant's Answer to Plaintiffs' Request for Admissions of Fact, with emphasis added.).

The University determined that the three named plaintiffs were not entitled to "instate" status. The determination was predicated upon a conclusion that the parent on whom each was financially dependent could not be domiciled in Maryland because each was in the country on a G-4 visa. Without success, all three plaintiffs availed themselves of the three-step appellate process provided by the University to students dissatisfied with their residence classification.[3]

---

[3] The "In-State Policy" provides that:

"A student who disagrees with his classification may request a personal interview with a classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee

The pertinent facts with respect to each of the individual plaintiffs are alleged as follows:

> "Plaintiff Moreno's father, Mr. Manuel A. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Manuel Moreno has owned a home in Maryland for the past twelve years. Plaintiff Moreno's mother, Mrs. Gladys M. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa. Manuel and Gladys Moreno own no property in Paraguay, having sold the house which they formerly owned there in 1960. Manuel and Gladys Moreno have paid all Maryland State and Montgomery County property taxes on their home as well as all state and local retail, motor vehicle, fuel, excise and other taxes applicable to them as required by law. Manuel and Gladys Moreno each hold a Maryland driver's license; their automobiles are registered in Maryland. Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years; they have no present intention to reside anywhere other than in the State of Maryland."
>
> (Paper No. 1, Verified Complaint, ¶ 16).
>
> "Plaintiff Moreno has lived with his parents since birth. He has lived in the United States since the age of four, has attended primary and secondary schools in the United States without interruption, and graduated from high school in Maryland. Plaintiff Moreno is a citizen of Paraguay; he now holds a G-4 visa. He holds a Maryland driver's license. He has filed United States and Maryland income tax returns for 1973 and 1974. Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years; he has no present intention to reside anywhere other than in the State of Maryland."

---

(IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final."



(*Id.*, ¶ 18).

> "Plaintiff Otero's father, Mr. Rene Otero, is a citizen of Bolivia and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Plaintiff Otero's mother, Mrs. Teresa Bailey Otero, is a citizen of the United States; she is registered to vote in Maryland. Rene and Teresa Otero resided in the District of Columbia from the time of their arrival in the United States in 1960 until 1965, when they moved to Maryland. Rene and Teresa Otero have owned a home in Maryland since 1965 and have resided therein for ten years; they have paid all Maryland State and Montgomery County property taxes thereon as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Rene and Teresa Otero each hold a Maryland driver's license; Rene Otero's automobile is registered in Maryland. Rene and Teresa Otero own no property in Bolivia. Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years; they have no present intention to reside anywhere other than in the State of Maryland."
>
> (*Id.*, ¶ 21).
>
> "Plaintiff Otero has lived with his parents since birth. He has lived in the United States since the age of five and has attended primary schools, seconday schools, and college in the United States without interruption. Plaintiff Otero is a citizen of Bolivia; he now holds a G-4 visa; he has made application to adjust his status to that of immigrant. Plaintiff Otero holds a Maryland driver's license. Plaintiff Otero has filed both United States and Maryland income tax returns in 1972, 1973, and 1974, and he has paid income tax to both Maryland and the United States in each of those three years. Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years; he has no present intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 23).

"Plaintiff [Clare B.] Hogg's father, Mr. Vincent Hogg, is a citizen of the United Kingdom and is the holder of a G-4 visa; he has been employed by the International Bank for Reconstruction and Development for thirteen years. Plaintiff Hogg's mother, Mrs. Barbara Hogg, and the Hoggs' daughter Susan are citizens of the United Kingdom. Susan Hogg married a United States citizen in 1973 and adjusted her status to that of permanent resident alien. Vincent and Barbara Hogg resided in the District of Columbia from the time of their arrival in the United States in 1962 until 1970, when they moved to Maryland. They have resided in Maryland for five years except as described below. Vincent and Barbara Hogg own their own home in Maryland as well as a house in which they formerly resided in the District; the house in the District is rented. Vincent and Barbara Hogg own no real property in the United Kingdom with the exception of a small condominium apartment which is currently listed for sale with a real estate agent and which it is their present intention to sell as soon as a sale can be consummated. Substantially all of their personal property and investments are here in the United States with the exception of a bank account in a sum equivalent to approximately five hundred dollars maintained by Vincent Hogg in the United Kingdom for the convenience of paying life insurance premiums and professional journal subscriptions; he does not make payments to the United Kingdom's State Pension Fund. Vincent Hogg's will was written in the United States and represents that he resides in Maryland. Vincent Hogg's automobiles are registered in Maryland. Vincent and Barbara Hogg each hold a Maryland driver's license. They belong to the local civic association in the area in which they reside. Vincent and Babara Hogg have filed joint United States income tax returns every year since 1963. In 1974 they paid income taxes to both the United States and to the State of Maryland on all income other than Mr. Hogg's salary from the



International Bank for Reconstruction and Development, as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period abroad of approximately nine months as part of Vincent Hogg's employment; they have no intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 26).

"Plaintiff Hogg has resided with her parents since birth. She has lived in the United States since the age of seven and has attended primary schools, secondary school, and college in the United States without interruption, with the exception of the approximately nine-month period described in paragraph 26 above. Plaintiff Hogg is a citizen of the United Kingdom; she now holds a G-4 visa; she holds a Maryland driver's license. Plaintiff Hogg has filed both United States and Maryland income tax returns in 1973 and 1974. Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in [the above paragraph]; she has no present intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 28).

Plaintiffs claim the actions of defendants in denying them "in-state" status are in violation of the Due Process, Equal Protection and Supremacy Clauses of the Constitution. They seek to enjoin the defendants from failing to reclassify them as students having "in-state" status and to enjoin the defendants from denying to any student "in-state" status either partially or wholly on the basis that such student or any parent or person on whom such student is financially dependent either holds a G-4 visa or pays no Maryland State income tax pursuant to an international agreement to

which the United States is a party on wages paid by an international organization.

Defendants have moved for summary judgment on various jurisdictional and procedural grounds, as well as on the merits of the case.

*I. Jurisdiction*

Defendants' initial argument is that this court lacks subject matter jurisdiction under 28 U.S.C. § 1343(3) or (4)[4] because plaintiffs' claim is founded upon the Maryland law of domicile and presents no federal question:

> "Plaintiffs' cause of action and the core of their grievance does not present a deprivation by the Defendants of a federal statutory or constitutional right, privilege or immunity, but rather, rests upon an interpretation of the Maryland definition of domicile." (Memorandum in Support of Defendants' Motion For Summary Judgment, at p. 10).

[1] Plaintiffs filed this suit pursuant to, *inter alia,* 42 U.S.C. § 1983 which authorizes a "suit in equity" against a "person" to redress "the deprivation" under color of any State regulation "of any rights, privileges, or immunities secured by the Constitution" to any "person within the jurisdiction" of the United States. This section creates a federal cause of action but it does not by itself confer jurisdiction on federal district courts to adjudicate claims brought pursuant to it. The jurisdictional counterpart of 42 U.S.C. § 1983 is 28

[4] Title 28, U.S.C., § 1343 provides that the district courts have jurisdiction of any civil action authorized by law to be commenced by any person:

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."



U.S.C. § 1343. *Hagans v. Lavine,* 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). Jurisdiction under § 1343(3) exists at least for deprivations by state officials of rights "secured by the Constitution of the United States."[5] Jurisdiction exists in this court under § 1343 (3) if a constitutional claim of sufficient substance has been raised by the § 1983 cause of action. *Hagans v. Lavine, supra.*

[2] Plaintiffs' § 1983 claim is premised on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Contrary to defendants' assertions, it is not the Maryland law of domicile which gives rise to this suit, but rather the "In-State Policy" of the University of Maryland which has been interpreted by the defendants as automatically classifying holders of G-4 visas as non-residents for purposes of tuition, on the assumption that no one in the United States on a G-4 visa can ever have the requisite intent to establish a Maryland domicile. The due process claim, premised on an argument that the University of Maryland's policy establishes an irrebutable presumption with respect to residence and domicile for tuition purposes similar to that struck down in *Vlandis v. Kline,* 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), and the equal protection claim, based on an alleged violation of both the strict scrutiny and the reasonable basis-rational relationship tests, are at the heart of this case. These are matters of federal law. Moreover, these claims are not so insubstantial as to warrant dismissal for lack of subject matter jurisdiction. Such dismissal could be granted only as to claims "absolutely devoid of merit," *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 579, 24 S. Ct. 553, 48 L. Ed. 795 (1904); "wholly insubstantial,"

[5] Whether the jurisdictional scope of § 1343(3) is fully coextensive with the substantive provisions of § 1983, so that § 1343(3) would provide jurisdiction for any suit premised on the deprivation under color of state law of a right secured by any Act of Congress is a question not yet decided by the Supreme Court, *Hagans v. Lavine, supra,* at 534 note 5, 94 S. Ct. 1372, but the Fourth Circuit has so held. *Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974).

*Bailey v. Patterson,* 369 U.S. 31, 33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962); "obviously frivolous,"*Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 30 S. Ct. 326, 54 L. Ed. 482 (1910); or "no longer open to discussion," *McGilvra v. Ross,* 215 U.S. 70, 80, 30 S. Ct. 27, 54 L. Ed. 95 (1909). *See also Hagans v. Lavine, supra, Baker v. Carr,* 369 U.S. 186, 198-204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

The claims in this case are clearly not insubstantial. *See Vlandis v. Kline, supra; Hooban v. Boling,* 503 F.2d 648 (6th Cir. 1974); *Klem v. Carlson,* 473 F.2d 1267 (6th Cir. 1973); *Jagnandan v. Giles,* 379 F. Supp. 1178 (N.D. Miss. 1974); *Sturgis v. State of Washington,* 368 F. Supp. 38 (W.D. Wash.), *aff'd mem.* 414 U.S. 1057, 94 S. Ct. 563, 38 L. Ed. 2d 464 (1973); *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527 (1971).

### *II. Are the Defendants "Persons" within 42 U.S.C. § 1983?*

[3] Defendants argue that this suit cannot be maintained against either the University of Maryland or Dr. Elkins, its President, since neither are "persons" within the meaning of 42 U.S.C. § 1983.

In *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the Supreme Court held that municipalities were not "persons" within the meaning of 42 U.S.C. § 1983, at least in damage suits. *Kenosha v. Bruno,* 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973), makes clear that that ruling also applies where the only relief sought is injunctive or declaratory. *Moor v. County of Alameda,* 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973), established that counties were not § 1983 persons. In *Huntley v. North Carolina State Board of Education,* 493 F.2d 1016, 1017 n.2 (4th Cir. 1974), the Fourth Circuit decided that municipal agencies are not "persons" for § 1983 purposes. A state is also not a proper defendant in a § 1983 action. *Meyer v. State of New Jersey,* 460 F.2d 1252 (3rd Cir. 1972; *Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969); *Hinish v. State of*



*Maryland,* 393 F. Supp 53 (D. Md. 1975). This doctrine applies equally to state agencies. *Bennett v. People of State of California,* 406 F.2d 36 (9th Cir.), *cert. den.,* 394 U.S. 966, 89 S. Ct. 1320, 22 L. Ed. 2d 568; *Cheramie v. Tucker,* 493 F.2d 586 (5th Cir.), *cert. den.,* 419 U.S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 107 (1974); *Edwards v. Philadephia Electric Co.,* 371 F. Supp. 1313 (D.C. Pa. 1974), *aff'd* 510 F.2d 969 (3rd Cir. 1975).

If the University of Maryland is a state agency, it is not a "person" within § 1983 and no cause of action can be brought against it under that section. Courts considering whether a particular college or university is or is not a state agency have considered the laws of the state as they define the relationship between the state and the school; whether the school is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of the school's autonomy over its operations; the ownership of the school's property; whether its property is immune from state taxation; whether the sovereign has immunized itself from responsibility for the school's operations; whether a judgment for damages against the school would be payable out of the state treasury; and the source of the school's financing. It has also been stated that generally the same inquiry is made and criteria considered in determining whether a state university is a § 1983 "person" as is made in deciding whether a damage suit against the state university would be barred by the Eleventh Amendment. *See Gordenstein v. University of Delaware,* 381 F. Supp. 718 (D. Del. 1974); *Samuel v. University of Pittsburgh,* 375 F. Supp. 1119 (W.D. Pa. 1974), *app. dismissed* 506 F.2d 355 (3d Cir. 1974); *Langsner v. Morgan State College,* Civil No. HM-74-1359 (D. Md. Jan. 9, 1976).

In *Langsner* Judge Herbert F. Murray held that Morgan State University was a state agency and not a "person" within the meaning of § 1983. In the present case an uncontradicted affidavit[6] of Dr. Wilson H.

[6] Under Rule 56, F.R.Civ.P., the uncontradicted facts in this affidavit may be taken as true.

Elkins, President of the University of Maryland, has been filed which establishes that virtually all of the factors considered determinative in *Langsner* apply also to the University of Maryland. These factors set forth in the margin[7] fall within the scope of the factors discussed in *Gordenstein, supra,* and *Samuel, supra,* as well. We are persuaded that the University of Mary-

[7] Dr. Wilson's affidavit states:

"(a) All real property of the University belongs to the State of Maryland, and substantially all such property is titled in the name of the State of Maryland to the Use and Benefit of the University of Maryland or to the Use and Benefit of the Board of Regents of the University of Maryland;

"(b) The sale and/or lease of real property of the University is reviewed by the Department of General Services, State of Maryland, and approved by the Board of Public Works (including the Governor of the State of Maryland), State of Maryland. The acquisition and/or lease of real property by the University of Maryland is similarly reviewed and approved;

"(c) All, or substantially all, of the contracts and leases to which the University of Maryland is a party are first reviewed by the Office of the Attorney General, State of Maryland;

"(d) Payroll checks of employees of the University are drawn on the treasury of the State of Maryland and bear the facsimile signatures of the Treasurer and Comptroller of the State of Maryland;

"(e) The annual Budget of the University is presented to and must be approved by the General Assembly of the State of Maryland, and is subject to review and amendment by the State Department of Budget and Fiscal Planning;

"(f) All University funds are funds of the State of Maryland. All funds available to the University are obtained substantially through appropriations of the Maryland General Assembly, including student fees, and government and private grants, which are specifically appropriated by the General Assembly for use by the University. All, or substantially all, bills paid by the University are paid through checks drawn on the Treasury of the State of Maryland;

"(g) The purchase of goods and equipment by the University is exempt from Maryland Sales Tax. The University is entitled to avail itself of the purchasing facilities of the Maryland Department of Budget and Procurement;

"(h) The University's financial records are audited by the Maryland General Assembly, Division of Legislative Auditors. The University must also provide to the Board of Public Works or any member of the General Assembly any requested information about any phase of its operation, and must make an annual report thereon to the latter;

"(i) Decisions by the University with respect to employment grievances, including terminations, of classified employees, are appealable for determination by the Secretary of Personnel, State of Maryland;

"(j) Such comprehensive liability insurance as the University is permitted to carry is authorized and limited under Article 77A, § 15A of the Annotated Code of Maryland. Insurance to University property is provided through participation in State of Maryland Insurance Plans;

"(k) The Board of Regents of the University consists of fifteen members. The Governor of the State of Maryland appoints fourteen with the advice and consent of the State Senate. The remaining members are the Maryland Secretary of Agriculture;

"(l) The Governor, the State Treasurer, and the State Comptroller are notified of all meetings of the Board of Regents of the University and have the authority to sit with the Board. The State budget director, and the chairmen of the State Senate Finance committee and the State House Ways and Means committee are invited to sit with the Board when requests for appropriations are prepared.

"(m) The University obtains its legal representation from the Attorney General of the State of Maryland"

In addition to the above, as noted by Judge Murray in *Langsner,* Art. 78A § 16C of the *Annotated Code of Maryland* would appear to indicate that any money judgment, against the University of Maryland "will be paid, if at all, by the State of Maryland." *Langsner,* p. 9.



land, like Morgan State College, is not a § 1983 "person" and cannot be sued under that section.

With respect to the other defendant, Dr. Elkins, however, it is equally clear that when he is sued in his official capacity under 42 U.S.C. § 1983 in a suit seeking injunctive and declaratory relief only, he is a "person"

for purposes of that section and amenable to suit thereunder. *Burt v. Board of Trustees of Edgefield Co. School Dist.*, 521 F.2d 1201 (4th Cir. 1975); *Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Gay Students Organization of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Rochester v. White*, 503 F.2d 263 (3d Cir. 1974); *Langsner v. Morgan State College, supra.*

*III. Case or Controversy*

[4] Defendants argue that this court lacks jurisdiction because no Art. III § 2[8] case or controversy exists between the plaintiffs and the defendants because the plaintiffs, dependent as they are on their parents, presumably do not pay their own tuition and thus stand to lose or gain nothing by the outcome of this lawsuit. Aside from the lack of evidence in the record to support the underlying assumption on the part of the defendants it is clear that the plaintiffs in this case are presenting a constitutional question "in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110, 89 S. Ct. 956, 960, 22 L. Ed. 2d 113 (1969). It is the plaintiffs themselves who attend the University of Maryland and who are allegedly being unconstitutionally overcharged by that institution.

The plaintiffs in this case have a personal stake in the outcome and have an interest adverse to the defendants since the tuition rates charged them as nonresidents must be paid in order for them to attend the University of Maryland. Plaintiffs' complaint alleges that they themselves are being subjected to higher tuition and other costs. Moreover, under Maryland law, *Annotated Code of Maryland*, Art. 1 § 24, plaintiffs who are all over 18, are adults. The law places no responsibility on their parents to pay their tuition. If these rates cannot be paid, either by the plaintiffs themselves, by their parents, or by both parents and students, the

[8] Art. III § 2 of the Constitution of the United States limits the judicial power of federal courts to "Cases" or "Controversies."



resulting loss of educational opportunity falls squarely on the plaintiffs. They have a sufficient interest to make the lawsuit an Article III case or controversy under the tests laid down by the Supreme Court. *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974); *Goosby v. Osser*, 409 U.S. 512, 93 S. Ct. 854, 35 L. Ed. 2d 36 (1973); *see also Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974).

*IV. Standing*

[5] Defendants also allege that plaintiffs lack standing to sue because they are financially dependent on their parents who, therefore, presumably pay all of plaintiffs' tuition costs. While the Supreme Court has noted that the concept of justiciability, which expresses the "case or controversy" requirement of Article III, is not synonymous with that of standing, *Schlesinger v. Reservists, etc., To Stop The War*, 418 U.S. 208, 215, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974), they do overlap. *See Warth v. Seldin, supra*, 422 U.S. at 498-499, 95 S. Ct. at 2204, where it is stated:

> "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204 [82 S. Ct. 691, 7 L. Ed. 2d 663] (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or

actual injury resulting from the putatively illegal action. . . .' *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 [93 S. Ct. 1146, 35 L. Ed. 2d 536] (1973). *See Association of Data Processing Service, Inc. v. Camp*, 397 U.S. 150, 151-154 [90 S. Ct. 827, 25 L. Ed. 2d 184] (1970)." (Footnotes omitted).

The plaintiffs in this case, as discussed above, are asserting their own legal rights and interests and have a sufficient stake in the outcome of this lawsuit to establish standing to bring it. *United States v. SCRAP*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973); *Association of Data Processing Organizations Inc. v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).

### *V. The Eleventh Amendment*

Defendants argue that the Eleventh Amendment to the Constitution bars this suit.[9]

[6, 7] Since the defendant University of Maryland cannot be sued under 42 U.S.C. § 1983, the Eleventh Amendment defense need be considered only with respect to Dr. Elkins. The short answer to this contention is that the Eleventh Amendment does not bar suits seeking only prospective injunctive relief against state officials who, acting in their official capacity under color of state law or regulation, deprive plaintiffs of constitutional rights. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Any ancillary effect which a prospective injunction against Dr. Elkins, if issued in this case, would have on the treasury of the State of Maryland is a "permissible and often an inevitable consequence of the principle announced in *Ex Parte Young, supra*." *Edelman v. Jordan, supra*, 415 U.S. at 668, 94 S. Ct. at 1358.

[9] The Eleventh Amendment provides:

"The Judicial power of the United States shall be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."



### *VI. Absention*

[8] Defendants urge the court to abstain from deciding this case in order that the Maryland courts can decide if a G-4 alien can be domiciled in Maryland.

Abstention is a judicially created doctrine. It has several branches to its family tree. Two of these branches are urged as applicable here to warrant this federal court to stay its hand.

The first is the abstention rationale enunciated in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), holding that a federal court should abstain in order to avoid unnecessary conflict with the regulation by a state of a complicated area of local interest.

The *Burford* case arose out of disputes concerning the application of a regulation of the Texas Railroad Commission establishing minimum spacing between oil wells. In *Burford* the Court stressed that abstention was appropriate because the Texas scheme of regulating oil and gas drilling was an extremely thorny problem involving certain "non-legal complexities." (*Id.* at 323, 63 S. Ct. 1098). The Texas legislature had established a Commission to resolve these technically complicated geologic factual disputes, "as a part of the entire conservation program with implications to the whole economy of the state." (*Id.* at 325, 63 S. Ct. at 1103). Moreover the Texas legislature had also established a system of thorough judicial review by its own state courts which could provide as full relief as could the federal courts. By concentrating all direct review of the Commission's orders in the state district court of one county, the Texas legislature also sought to avoid the confusion of multiple review of the same general issues. Prior interference by federal courts in this regulatory scheme, the *Burford* Court noted, had previously caused such confusion and had created numerous problems for the Texas Governor, the Texas legislature and the Railroad Commission.

The considerations which persuaded the *Burford* Court to order federal abstention are absent from this case. The process by which the University of Maryland determines a student's domicile does not involve a complicated area which the Maryland legislature has singled out for special treatment. The legislature has not seen the need to create a state agency staffed with experts in order to effect a consistent and harmonizing treatment of a particularly thorny matter of local interest. There is no special system of judicial review. There is no history of prior interference by the federal courts in the University of Maryland's procedures, causing confusion and inconsistency. It is not predictable that the normal functioning of the system by which the state determines a student's domicile would give rise to a surfeit of lawsuits seeking to interpose federal courts in matters of purely state interest. Even this suit, although the named plaintiffs do seek this court to declare them Maryland domiciliaries, has as its primary thrust to force the classification process to operate meaningfully with respect to G-4 alien students. The plaintiffs here are not seeking to "short circuit" the University of Maryland's classification scheme, but rather have submitted themselves to it. A decision by this court on the merits of plaintiff's complaints will not conflict with a state regulatory scheme in the manner feared by the Court in *Burford*. Since none of the factors determinative in *Burford* exists here, abstention on the rationale of that case is not warranted.

The second branch of the abstention family tree invoked by the defendants is the so-called *Pullman* doctrine. The decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), and its progeny have established that abstention is proper where an interpretation or construction of an unclear state statutory or constitutional provision might end the litigation, thereby eliminating the need for a federal court to resolve federal constitutional issues. *Kusper v. Pontikes*, 414 U.S. 51, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973); *Lake Carriers' Association v.*



*MacMullan*, 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1974). The primary reasons for invoking abstention in the *Pullman* context are to avoid unnecessary friction in federal-state relations and to avoid premature federal constitutional adjudication. *Harman v. Forssenius*, 380 U.S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965).

The language of the "In-State Policy" of the University of Maryland which is under attack here is not subject to an interpretation in a Maryland court which would avoid plaintiffs' federal constitutional challenge. That regulation on its face establishes that only "U.S. citizens" and "immigrant aliens" can establish in-state status, and then only under certain conditions which are discussed *infra*. By virtue of the words of the "In-State Policy," the University of Maryland, as a result of the fact that the plaintiffs' fathers, whose domiciles are determinative of their respective dependent's residency status, are all non-immigrant G-4 aliens, will automatically attribute to them out-of-state status for admission, tuition and charge differential purposes. No interpretation of the wording of the "In-State Policy" has been offered which changes that stated result. Since the regulation is clear and is not subject to any interpretation which could avoid a federal constitutional issue, the reasons for invoking the *Pullman* abstention doctrine are absent. *Wisconsin v. Constantineau*, 400 U.S. 433, 437-439, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971); *Zwickler v. Koota*, 389 U.S. 241, 250, 251, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967).

Nevertheless, defendants argue that abstention is appropriate because the Maryland courts have never decided whether or not a G-4 alien could establish a Maryland domicile. This novel abstention argument would require federal courts to abstain whenever an unresolved question of state common law is involved in federal constitutional litigation. Defendants have presented no authority, and the court has found none, which supports the application of the abstention

doctrine in these circumstances. The Maryland common law of domicile is clear and provides sufficient background to resolve the domicile question raised by the plaintiffs in the context of their federal constitutional challenge to the University of Maryland's policies. *See Mariniello v. Shell Oil Company,* 511 F.2d 853, 860-861 (3rd Cir. 1973).

Federal district courts are presumed to be knowledgeable in the law of the states in which they sit, *see Runyon v. McCray,* ___ U.S. ___, ___, ___, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), and are often called upon to resolve state law domicile questions in diversity of citizenship cases.[10] While this is not a diversity case and there is a constitutional question to be resolved, on balance, it would be unwise to extend the abstention doctrine to a case such as this. No principles of federalism would be advanced since no unclear state statute or constitutional provision subject to state court construction or interpretation is involved. The delay and expense attendant if the court abstained would be great. Abstention has been confined to certain narrowly limited special circumstances, *Kusper v. Pontikes, supra; Lake Carrier's Association v. MacMullan, supra; Lindsey v. Normet,* 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972), which do not exist here. Therefore, the court declines to abstain in this case. *See also Examining Board of Engineers, Architects and Surveyors v. DeOtero,* 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976).

### *VII. The Merits*

### *A. Due Process*

Plaintiffs raise a due process claim, relying principally on *Vlandis v. Kline,* 412 U.S. 441, 93 S. Ct. 2230,

[10] Abstention has never been deemed appropriate in diversity cases merely where there are unsettled questions of state law involved. *McNeese v. Board of Education,* 373 U.S. 668, 673, n. 5, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); *Meredith v. Winter Haven,* 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943); *Martin v. State Farm Insurance Co.,* 375 F.2d 720, 722 (4th Cir. 1967).



37 L. Ed. 2d 63 (1973); *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), *and Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974). While plaintiffs do not challenge the University of Maryland's policy of charging non-domiciliaries higher tuition rates, they do allege that the University of Maryland's "In-State Policy" creates an irrebuttable presumtpion, that non-immigrant aliens holding G-4 visas cannot establish a Maryland domicile, a fact that is not, they argue, universally true.

In *Vlandis,* the Supreme Court declared unconstitutional a Connecticut statute which classified certain married and unmarried students accepted for admission to the University of Connecticut as out-of-state students for tuition purposes based on the applicant's legal address prior to or at the time of his application. Under the statute, if a student were classified "out-of-state" under this system at the time of application for admission, the student could not change his status no matter what the student's actual domiciliary intent was at a later date. The student's status established at the time of his application for admission was deemed to continue during his period of attendance at the university.

In reaching its decision the Court noted:

> "It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category." (412 U.S. at 448, 93 S. Ct. at 2234).

Under these circumstances, the Court rejected the state's attempts at justification and held that:

> ". . . since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the

> resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona-fide resident entitled to in-state rates." (412 U.S. at 452, 93 S. Ct. at 2236).

In *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the Court held unconstitutional on due process grounds Illinois' statutory irrebuttable presumption that all unmarried fathers are unqualified to raise their children. The Court said that a state could not conclusively presume that every unmarried father was unfit to raise his children, but must under the due process clause provide an opportunity for a hearing on the issue of a particular unmarried father's fitness where his fitness was challenged.

Similarly, in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974), the Court invalidated mandatory leave and return rules for pregnant teachers in Ohio and Virginia on due process grounds, because the rules established conclusive presumptions of facts which were not universally true, namely that all women, who were 4 or 5 months pregnant or who gave birth 3 months or less before they sought to return to work, were physically incapable of performing their duties. The Court held that such determinations had to be made on an individual basis. The maternity leave rules were found to have no rational relationship to the interests of those states in preserving continuity of instruction and in protecting the health of the mother or expectant mother.

In this case, then, several questions relative to plaintiffs' due process claim must be resolved: (1) does the University of Maryland's "In-State Policy" create an irrebuttable presumption concerning the domicile of



G-4 alien? (2) if so, is that presumption appropriate because universally true? (3) if not, can the defendants so justify that presumption as to save it from unconstitutionality?

The defendants argue that the "In-State Policy" does not rest upon or create an irrebuttable presumption as to the domicile of a G-4 alien, but merely establishes the status of an individual as a G-4 alien as one of the factors to be considered in determining domicile for tuition purposes, albeit the "paramount" factor. Defendants also argue that there is no irrebuttable presumption, because plaintiffs may, as may any other student, obtain review of their domiciliary classification at any time. However, these arguments fall short of the mark. As admitted at oral argument, and as evidenced by the express language of the "In-State Policy," the University of Maryland determines on a case-by-case basis for tuition and fees purposes the domicile of only *"United States citizens* and . . . *immigrant aliens lawfully admitted for permanent residence* in accordance with the laws of the United States." Under the University's policies, a financially independent student in the United States on the basis of a G-4 visa, or a student who is financially dependent on a parent who holds a G-4 visa, as are the named plaintiffs in this case, is automatically "attributed out-of-state status for admission, tuition, and charge differential purposes. . . ."[11] So long as the G-4 visa status of the student or his parent continues, any other evidence of domicile brought before the University could not possibly produce a reclassification of the student in question. The single controlling factor in the case of a G-4 alien is that visa classification. All other facts relating to domicile are irrelevant. The fact that the State will listen to evidence totally immaterial to its predetermined conclusion concerning the domicile of a G-4 alien

[11] The University bases the tuition rates of a financially dependent student on the domicile of his parents. A parent with a G-4 visa could not, under the In-State Policy, establish a Maryland domicile.

does not make that conclusion any less irrebuttable. *See United States Department of Agriculture v. Murry*, 413 U.S. 508, 512, 93 S. Ct. 2382, 37 L. Ed. 2d 767 (1973); *Stanley v. Illinois, supra.*

However, even if a certain presumption of fact is irrebuttable, the resulting classification system is not *a fortiori* unconstitutional. If the presumed fact is necessarily true, it would be different from the presumptions about students in *Vlandis*, mothers in *LaFleur*, fathers in *Stanley*, household members in *Murry*, and drivers in *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), among others, which the Court has previously invalidated.

The defendants have argued that domicile is the basis on which tuition rates are determined and that all nonresident aliens, including those in the United States on G-4 visas, are precluded by the terms and conditions of their visas from being domiciled in Maryland. If, as the defendants argue, under the law of domicile of Maryland, a G-4 alien cannot establish domicile, then a classification based on domicile which presumes nondomicile for such aliens is not contrary to fact and is universally true. Inquiry therefore must be made into the common law of Maryland relating to domicile and into federal law defining the nature of a G-4 alien's stay in the United States.

*B. Maryland Law of Domicile*

In *Shenton v. Abbott*, 178 Md. 526, 15 A.2d 906 (1940), the Court of Appeals of Maryland held that:

> "A person's domicile is the place with which he has a settled connection for legal purposes, either because his home is there or because that place is assigned to him by the law. It is well defined as that place where a man has his true, fixed, permanent home, habitation and principal establishment, without any intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning." (*Id.*, at 530, 15 A.2d at 908).



*Shenton v. Abbott* also establishes that a person retains his original domicile if he does not acquire a new one. Two elements must be shown to prove a change of domicile: (1) actual removal to or physical presence in another habitation and (2) an intent to remain there permanently or at least for an unlimited time. *Id.* at 530, 15 A.2d 906. If a person has established a new domicile, a "floating intent to return to his former domicile at some future time" does not negative the intent to establish the new domicile. *Id.* at 533, 15 A.2d at 909.

It is indisputable in this case that plaintiffs' fathers, because they are G-4 aliens, did not have Maryland as their respective original domiciles but each could only have acquired a Maryland domicile if he had changed his original domicile. The court in *Shenton* also stated:

> "No temporary residence, whether for the purposes of business, health, or pleasure, occasions a change of domicil. Even though a person may be absent from his domicil for many years, and may return only at long intervals, nevertheless he retains his domicil if he does not acquire a domicil elsewhere." (*Id.*, at 530, 15 A.2d at 908).

As a general proposition of law, *Shenton* noted that "[T]he determination of the place of domicil depends upon the circumstances of each case." (*Id.*, at 533, 15 A.2d at 909). All of these principles are still controlling Maryland law. *Bainum v. Kalen*, 272 Md. 490, 325 A.2d 392 (1974); *Knapp v. Comptroller*, 269 Md. 697, 309 A.2d 635 (1973); *Liberty Mutual Insurance Co. v. Craddock*, 26 Md. App. 296, 338 A.2d 363 (1975).

In addition to physical presence and intent to remain permanently or indefinitely, the Maryland courts implicitly recognize, as another factor necessary to the establishment of a new domicile, that the person seeking to change his domicile must have the legal capacity to do so. *Liberty Mutual Insurance Co. v. Craddock, supra*, at 303, 338 A.2d 363. *See Restatement (Second) of Conflicts*, § 15 (1971). Thus, in the case of a

minor child, ordinarily legally incapable of a domicile separate from that of its parent, the domicile of a minor child in Maryland is with its parents. If the child's parents are divorced, the child's domicile is that of the parent to whom legal custody has been awarded. *Taylor v. Taylor,* 246 Md. 616, 619, 229 A.2d 131 (1966); *Berlin v. Berlin,* 239 Md. 52, 55, 210 A.2d 380 (1964); *Rethorst v. Rethorst,* 214 Md. 1, 133 A.2d 101 (1957). However, a minor child retains the domicile of its father if the child lives with neither parent. *Rethorst v. Rethorst, supra,* at 12. 133 A.2d 101. If there has been no legal fixing of custody, then the minor child's domicile is that of the parent with whom it lives. *Id.*; *Ross v. Pick,* 199 Md. 341, 349, 86 A.2d 463 (1952). A minor child who falls within these common law principles can never establish an independent domicile, whatever may be that child's intent to do so. Because a minor child is not *sui juris* and can therefore not have legal effect given to its actual intent, physical presence in a certain state, and an intent to remain there indefinitely, do not fix or change the domicile of a minor. During minority, the common law fixes the child's domicile. *Sudler v. Sudler,* 121 Md. 46, 88 A. 26 (1913).

There is nothing in Maryland law, possibly aside from the principle that a person intending a change in domicile must be legally capable of doing so, to prevent a G-4 visa holder from obtaining a Maryland domicile. Therefore, federal law must be examined to determine whether such law relating to G-4 aliens in any respect renders such aliens legally incapable of changing the domicil.

### *C. Federal Law*

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.,* defines 12 classes of nonimmigrant aliens which, including subclasses, describe 17 types of nonimmigrants. Class G aliens are aliens who are in the United States as resident representatives of foreign governments and members of their immediate families and staffs, as well as aliens who are foreign



representatives to or employees of international organizations covered by the International Organizations Immunities Act, 22 U.S.C. § 288, and members of their immediate families and personal staffs. Specifically, G-4 aliens are:

> "(iv) officers, or employees of such international organizations and the members of their immediate families."

In contrast to those classes of aliens who are defined as aliens "having a residence in a foreign country which [they have] no intention of abandoning," 8 U.S.C. § 1101(a)(15)(B), (F), (H), (J), or as aliens who intend to enter the United States "temporarily" or who are "in transit" § 1101(a)(15)(C), (D), (L), a G-4 alien is simply defined as an employee of an international organization. The statute, therefore, does not define a G-4 alien in terms of an express intent on the part of such alien relative to his domicile.

The visa itself held by a G-4 alien is not determinative of the domicile issue. A visa is essentially a document of entry. *Alves v. Alves,* 262 A.2d 111, 115 (D.C. App. 1970); see 22 C.F.R. § 41.120. Its period of validity has no relation to the period of time an alien may be authorized by the immigration authorities to stay in the United States, 22 C.F.R. §41.122(a). The stay of a G-4 alien is governed by regulations of the Immigration and Naturalization Service. 8 U.S.C. § 1184(a). As provided in 8 C.F.R. § 214.1(a):

> "(a) *General.* Every nonimmigrant alien applicant for admission or extension of stay in the United States shall . . . agree that he will abide by all terms and conditions of his admission or extension, and that he will depart at the expiration of the period of his admission or extension or an abandonment of his authorized nonimmigrant status."

The period of admission of a G-4 alien is for so long as the alien continues to be recognized by the Secretary of State as a member of that class of aliens. In terms of the present case, the period of admission of the

plaintiffs' fathers is for so long as they are respectively employed by international organizations governed by the International Organizations Immunities Act, cited *supra*. 8 C.F.R. §§ 214.1(a), 214.2(g).[12]

[9] The mere fact that a G-4 alien is subject to being deported if he changes his employment does not make him legally incapable of establishing a Maryland domicile or of intending to remain or remaining here indefinitely. In *Alves v. Alves, supra,* the District of Columbia Court of Appeals held specifically that a G-4 alien was domiciled in the District of Columbia. In that divorce case the appellant wife challenged the finding of the lower court that her husband was a D.C. domiciliary on the ground here argued that "the appellee did not have the legal capacity to form an intention to become a domiciliary of the District of Columbia since he was living here at the grace of Great Britain and United States." (*Id.,* at 114). The wife also argued that the husband had to adjust his status to permanent resident before he could become domiciled in the District of Columbia.[13] The *Alves* court rejected the last contention holding that under the immigration laws it is legally possible "for an alien to remain in the United States for many years . . . without applying for permanent residence" and that such a contention wrongfully ignores, "the period of time [the alien had] resided in the District of Columbia, his intention in moving into the District of Columbia and other relevant

[12] Under 8 U.S.C. § 1251(a)(9) an alien is subject to deportation who— "(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed . . ., or to comply with the conditions of any such status."

[13] The domicile rule in the District of Columbia as quoted by the court in *Alves* is substantially similar to the Maryland rule:

> ". . . physical presence with an intent to abandon the former domicile and to remain in the District of Columbia for an indefinite period of time." (*Alves, supra,* at 114).



factors." ((Id., at 115). As to the first contention the court held:

> "The fact that appellee entered the United States on a nonimmigrant visa . . . does not preclude a finding that appellee could become domiciled in the District of Columbia.
>
> * * * * * *
>
> . . . At best it might be argued appellee had a floating intent to return to Great Britain conditioned upon an uncertain event — his dismissal from the I.M.F. — which event may never occur. But such a floating intention to return to Great Britain is not sufficient to require a holding that appellee was still domiciled in Great Britain." (footnotes omitted). (*Id.,* at 115-116).

*Accord, Rzeszotarski v. Rzeszotarski,* 296 A.2d 431 (D.C. App. 1972); *Gosschalk v. Gosschalk,* 48 N.J. Super. 566, 138 A.2d774, *aff'd,* 28 N.J. 73, 145 A.2d 327 (1958). The Court of Appeals of Maryland, as mentioned above, has also held that a floating intent to return to a former domicile at some future date does not negative the intent to establish a new domicile. *Shenton v. Abbott, supra,* at 533, 15 A.2d 906.

The *Restatement (Second) of Conflicts* recognizes in §17, Comment g, that a refugee may acquire a domicile of choice even if he is present in this country on a temporary visa:

> "Even in the latter situation, [refugee present on a temporary visa] it is possible for a refugee to acquire a domicile of choice in his asylum, although the presumably temporary nature of his stay may cast some doubt upon whether he has formed the requisite attitude of mind toward it . . ." (Citations omitted). (*Id.,* at 69).

The *Restatement* also states with respect to domiciliary intent that:

> "[I]f [one] does not intend to move at a definite time, it is easier to find that he has this attitude of mind than if he intends to move at a definite time.

> It is possible, however, for a person to have the proper attitude of mind even though he does intend to move at a definite time; although the more distant that time is, the easier it is to find the requirement satisfied." (*Id.*, at 71).

The rule expressed in *Alves* and in the *Restatement*, as applied to a G-4 alien, who presently intends to remain in Maryland indefinitely but who may have to return to his native country at the conclusion of his employment, makes it clear that such a G-4 alien is not legally incapable of establishing a Maryland domicile. Furthermore, as noted *supra*, there is nothing in the statutory definition in 8 U.S.C. § 1101 of a G-4 alien, as opposed to certain other types of nonimmigrant aliens, which indicates that Congress sought to negate a domiciliary intent on the part of a G-4 alien.

In summary, under Maryland law the plaintiffs' fathers must be able to demonstrate physical presence in Maryland, an intent to remain here indefinitely and the legal capability to do so. The federal immigration laws do not render the plaintiffs' fathers legally incapable of demonstrating and being able to carry out a present intention to remain in Maryland indefinitely. Plaintiffs' fathers' G-4 status, in fact, gives them that precise status, residents of Maryland for an indefinite period of time. This legal capacity coupled with physical presence and sufficient evidence of the requisite intent is all that the law of Maryland requires to establish domicile.

Defendants place principal reliance on Revenue Ruling 74-364 and *Seren v. Douglas*, 30 Colo. App. 110, 489 P.2d 601 (1971).

The Revenue Ruling squarely holds that a G-4 alien is under a legal disability which renders him incapable of forming the intention necessary to establish a domicile in the United States. That holding is based on the fact that a G-4 alien is required to depart at the expiration of the period of his admission. However, as demonstrated above, under federal law a G-4 alien is capable of



remaining in Maryland indefinitely and, therefore, has the legal capacity to have the necessary intent to establish a Maryland domicile while physically present in Maryland. As an explication of the *law of domicile*, this court believes the Revenue Ruling is in error.

Revenue Ruling 74-364 relies as do the defendants, on *Seren v. Douglas, supra*. In that case, Seren, a student, entered the United States in 1967 on a student visa which expired in April, 1968. In July of 1968, after Seren had married a University of Colorado coed, a petition for an immigrant visa was granted which entitled him to apply for status as a permanent resident alien. On January 20, 1970, the United States Immigration and Naturalization Service granted Seren the status of "lawful permanent resident." The University of Colorado contended that Seren, who had been a nonstudent resident of Colorado between April, 1968, and January, 1970, was under a legal disability prior to January 20, 1970, to formulate the requisite intent to become domiciled in Colorado. The University based its contention on the fact that Seren had entered the United States on a student visa and was a nonimmigrant alien classified under 8 U.S.C. § 1101(a)(15)(F)(i) as an alien with "a residence in a foreign country which he has no intention of abandoning . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . .." With respect to this argument, the court held:

> "We agree that the federal statutes in question did create a legal disability which would render Seren incapable of forming the intent required by state statute *so long as he, in compliance with federal law, was here on a legal basis which bound him to not abandon his homeland.* However, that disability could, as a matter of fact and law, have dissolved upon the expiration of his student visa. At such time he could abandon his legal intent to return to his homeland and seek status as a permanent resident of the United States." (Emphasis added).

A G-4 alien is not bound by federal law "to not abandon his homeland" and could at any time "abandon his legal intent to return to his homeland and seek status as a permanent resident of the United States." Therefore, the very language of the *Seren* court warrants a holding that a G-4 alien is not under a legal disability to establish a Maryland domicile. The *Seren* court also held that the dissolution of Seren's legal disability was not contingent on his being granted lawful permanent resident status on January 20, 1970, but that the disability dissolved prior to that date.

*In Re Gaffney's Estate,* 141 Misc. 453, 252 N.Y.S. 649 (1931), also relied on by the defendants, is distinguishable on at least two grounds. That case dealt with whether Patrick Cassidy, who had "arrived in this country only recently" (*id.,* at 652) as a temporary visitor for 3 months only, could qualify under New York law to be appointed as administrator of his brother's estate. New York law rendered incompetent one who was an "alien not an inhabitant of this state." In finding that Cassidy was not competent, the court relied on the fact that Cassidy was present only for 3 months on a visitor's visa and would have to leave the country at the end of that time. As distinguished from Cassidy's situation, the holder of a G-4 visa is not under similar constraints. In noting that, "[A]lienage alone does not disqualify an administrator, but there must be adequate proof of his being an inhabitant" (citation omitted) (*id.,* at 653), the *Gaffney's Estate* court highlighted the second ground upon which that case is distinguishable from this one. Far from deciding that a nonimmigrant alien could never establish a domicile in the United States, the court there decided only that Mr. Cassidy did not establish by competent evidence that he was an "inhabitant" of New York.

[10, 11] The presumption utilized by the University of Maryland in enforcing its "In-State Policy" is that no class of nonimmigrant aliens can establish a Maryland domicile. As such, it is an irrebuttable presumption



which is not universally true since G-4 aliens are not legally incapable of establishing Maryland domicile. That the University has "reasonable alternative means of making the crucial determination" of a nonimmigrant alien's domicile, *Vlandis v. Kline, supra* 412 U.S. at 452, 93 S. Ct. at 2236, is demonstrated by the fact that it makes just such a determination on a case-by-case basis with regard to other students seeking to pay domiciliary tuition rates under its "In-State Policy." The irrebuttable presumption relating to nonimmigrant aliens encompassed by the University's "In-State Policy" therefore is an invalid measure of domicile.[14]

If the University were to seek to justify its treatment of nonimmigrant aliens on the theory of cost equalization, this argument must fail because basing a conclusive presumption of non-domicile on nonimmigrant status would be as stated in *Vlandis* "wholly unrelated to that objective." (*Id.,* at 441, 93 S. Ct. 2230). Nonimmigrant aliens, even those such as plaintiffs' fathers whose salaries are exempt from state income tax, who have resided in Maryland for 10 or 15 years, as have plaintiffs' fathers, might well have contributed far more financial support to the University of Maryland through payment of real property, sales and other taxes than would have a student, financially independent for at least 12 months, who maintained a domicile in Maryland for 6 months prior to his class registration. Yet such a student, who conceivably could have contributed almost nothing to the Maryland tax base, is allowed to prove Maryland domicile under the "In-State Policy." Nor can the University's policy be justified on the ground of administrative certainty or administrative convenience. *Vlandis v. Kline, supra,* at 441, 93 S.

[14] The fact that Congress, empowered by the Constitution and statute to distinguish between citizens and aliens, may legitimately draw lines to establish qualification requirements, under which certain aliens will be eligible for federally funded programs and others will not, does not necessarily raise parallel powers in the States. *See Mathews v. Diaz,* 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).

Ct. 2230; *Stanley v. Illinois, supra,* 405 U.S. 656, 92 S. Ct. 1208. *Cf. City of Charlotte v. Local 660, etc.,* 426 U.S. 283, 96 S. Ct. 2036, 48 L. Ed. 2d 636 (1976).

Since the "In-State Policy" of the University of Maryland, as applied to G-4 aliens, creates a constitutionally impermissible irrebuttable presumption, it is not necessary to reach the issues raised by plaintiffs' equal protection and supremacy clause claims.

*D. Relief*

Declaratory relief and an injunction prohibiting the University of Maryland from denying to the plaintiffs in-state status solely because they or their parents are holders of a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) must be granted in this motion for summary judgment.[15] However, in addition plaintiffs also request this court (1) to enjoin the defendants from failing to

[15] Neither declaratory nor injunctive relief with respect to plaintiffs' fathers' tax-exempt status is warranted. Because the University of Maryland automatically determined that the plaintiffs' fathers', as G-4 aliens, were not Maryland domiciliaries, the University never meaningfully applied domiciliary criteria, see *supra,* to the plaintiffs. One of these criteria is whether or not the person whose domicile is being determined pays Maryland income tax on all earned income. The record does not establish that the University would universally deny "in-state" status to students solely on this ground. In fact, the defendants have admitted that a parent holding an immigrant visa could establish Maryland domicile regardless of a Maryland income tax exemption, if that parent could demonstrate the other relevant domiciliary criteria. (Defendants' answers to plaintiffs' requests for admissions, Paper No. 7, ¶ 10). This issue is not ripe for resolution in this case. Since the University of Maryland will be required, henceforth, to review G-4 aliens in the same manner as citizens and immigrant aliens, the court will presume that all of these individuals will be given the same kind of review. The court will also presume that, consistent with the University's admission, it will not preclude any student from establishing that he or she is a domiciliary of Maryland solely because of that student's parent's Maryland tax-exempt status under an international agreement. If the University were to act contrarily, serious constitutional questions would arise.



classify them as in-state students, (2) to certify this suit as a class action, (3) to frame appropriate relief for the class so certified, and (4) to award plaintiffs costs and attorneys' fees.

In order for plaintiffs to prevail on this motion for summary judgment in their request that they be classified as in-state students, the court must find that there is no dispute concerning the facts material to a determination that each of the fathers of the plaintiffs, on whom each plaintiff is dependent, is domiciled in Maryland.

[12] The law in this Circuit governing summary judgment is very strict. In order for summary judgment to be granted there can be no dispute as to any material fact or as to any controlling inference to be drawn from material facts. *American Fidelity and Casualty Co. v. London and Edinburgh Insurance Co.,* 354 F.2d 214, 216 (4th Cir. 1965). The burden is on the plaintiffs to establish that there are no such disputes, and any doubt as to the existence of a disputed material fact or inference drawn therefrom must be resolved against the plaintiffs. *Phoenix Savings and Loan, Inc. v. Aetna Casualty & Surety Co.,* 381 F.2d 245, 249 (4th Cir. 1967).

Plaintiffs, in attempting to establish that the undisputed facts warrant a holding that their fathers are domiciled in Maryland, rely on their Verified Complaint and the exhibits attached thereto and on the affidavits filed as part of their motion for summary judgment.

[13, 14] Plaintiffs' reliance on the Verified Complaint filed in this case is misplaced. Since the relevant domicile for tuition purposes under the valid portion of the University's "In-State Policy" is the domicile of plaintiffs' fathers, any verification of facts alleged in the complaint by the plaintiffs themselves is of little evidentiary value on the crucial question of the present intent of each father to remain permanently or indefinitely in Maryland. Counsel for the plaintiffs have not filed any affidavits of plaintiffs' fathers in this case which contain relevant evidence of this intent. The

complaint itself is only verified by the plaintiffs with respect to the allegations that pertain to them (Paper No. 1). In addition, the verifications are only on "information and belief." While it is true that sworn and notarized pleadings may sometimes be considered the equivalent of affidavits in summary judgments proceedings, *Fletcher v. Norfolk Newspapers, Inc.*, 239 F.2d 169 (4th Cir. 1956); *Dabney v. Cunningham*, 317 F. Supp. 57 (E.D. Va. 1970), the verified pleadings in those cases contain only facts about which the pleader had personal knowledge and which concerned him directly. In order for a verified complaint to substitute for an affidavit, it must meet the standards of F. R. Civ. P. 56(e), that is it must be made "on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters therein." *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974); *Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F.2d 150 (5th Cir. 1965); *Avery v. Norfolk & Western Railway Co.*, 52 F.R.D. 356 (N.D. Ohio 1971); 6 J. Moore, *Federal Practice*, ¶ 56.11[3], pp. 56-249-251 and ¶ 56.22[1], pp. 56-1303-1311 (1976). [Hereinafter, *Moore*]. The Verified Complaint in this case does not meet this standard and is inadequate to support plaintiffs' motion for summary judgment.

The fact that defendants filed no opposing affidavits setting out contradictory facts and merely relied on denials in their Answer (Paper No. 3, ¶¶ 16, 18, and 21) concerning facts relevant to plaintiffs' fathers' domicile is not significant in this case. Such denials would have been insufficient under F. R. Civ. P. 56(e) if the plaintiffs had met their burden of establishing that the relevant facts were not in dispute and that they were entitled to judgment as a matter of law. However, if a party moving for summary judgment fails to meet his burden, it is not incumbent upon the opposing party to do anything. *Adickes v. Kress & Co.*, 398 U.S. 144, 159-161, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); F. R. Civ. P. 56(c); 6 *Moore*, ¶ 56.11[3] p. 56-252, ¶ 56.23, p. 56-1390.



[15-17] Of course, under F. R. Civ. P. 56(c) plaintiffs may rely solely on the pleadings and do not have to file any supporting data if they choose not to do so. A motion made by a claimant on the basis of the complaint and answer is functionally equivalent to a motion for judgment on the pleadings under Rule12(c). *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270 (2d Cir. 1968); 6 *Moore*, ¶56.02[3], p. 56-29; ¶ 56.09; ¶ 56.11[1-1]; ¶ 56.11[2], p. 56-210. However, because of defendants' Answer has raised an issue of material fact with respect to the allegations in the Verified Complaint concerning plaintiffs' fathers' domiciles (Paper No. 3, ¶¶ 16, 18, and 21), plaintiffs may not prevail on this ground either. *Id.*; 2A *Moore*, ¶ 12.15. Since there is nothing in the entire record with respect to the fathers of plaintiffs Hogg and Moreno on which plaintiffs can rely in meeting their burden under Rule 56 on this factual question, this court cannot now enjoin the defendant from failing to classify students Hogg and Moreno as in-state students on the basis of the current record.

With respect to the father of plaintiff Otero, the record does contain some material filed as exhibits to the Verified Complaint which is entitled to consideration on this issue. In the process of attempting to convince the University of Maryland that plaintiff Otero was domiciled in Maryland, Rene Otero, plaintiff's father, partially completed under oath the University of Maryland form entitled "Petition for In-State Classification for Admission, Tuition and Charge-Differential Purposes." This form requires that the parent upon whom the student's domicile depends fill out sections II and IV of the form.

In section II Rene Otero has stated that he occupies real property in Maryland as his domicile on a year-round basis; that he has resided in Chevy Chase, Maryland since March 1, 1965; that all or substantially all of his possessions are in the State of Maryland; that Mrs. Otero is registered to vote in Maryland; that he has a Maryland driver's license and that his car is registered in Maryland. Rene Otero has also filed copies, certified by him to be true copies and sworn to before a notary, of his wife's

Maryland driver's license, his driver's license, his Maryland automobile registration for 3 automobiles, and his son's W-2 forms and Maryland Income Tax form, all listing Chevy Chase as their address. It is also undisputed from the record that Rene Otero is a G-4 alien employed with Inter-American Development Bank; that Mrs. Otero is an American citizen; that Rene Otero has not made any attempt to adjust his status from G-4 to resident alien; and that his current employer has a policy which would prevent him from making that adjustment while he is so employed. While all of these facts are material in the determination of Mr. Otero's domicile, the record is still deficient in evidence concerning his domiciliary intent. This crucial factor of intent is one which is particularly difficult to resolve on the basis of a bare written record and summary judgment can seldom be granted in cases where intent is in issue. *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485 (4th Cir. 1973); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974); *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962). Therefore, even though the court has before it some evidence of Mr. Otero's domicile, summary judgment cannot be entered in favor of plaintiff Juan Pablo Otero.

*E. Class Action*

[18] Plaintiffs seek to maintain this suit as a class action under F. R. Civ. P. 23 (b)(2) which applies to suits in which:

> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

It is clear that the University's actions with respect to classifying G-4 aliens or their dependents as out-of-state students have been taken in accordance with official University policy and thus "on grounds generally applicable to the class." This case is then appropriately brought under 23(b)(2), assuming plaintiffs meet the



additional burdens imposed upon them to establish that this suit should proceed as a class action.

F.R. Civ. P. 23(a) provides 4 additional prerequisites for the maintenance of a class action. A class action may be maintained under Rule 23 only if:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The burden is on the plaintiffs to meet these and all of the requirements for the maintenance of a class action. *Carracter v. Morgan*, 491 F.2d 458 (4th Cir. 1973); *Poindexter v. Teubert*, 462 F.2d 1096 (4th Cir. 1972); *McAdory v. Scientific Research Instruments, Inc.*, 355 F. Supp. 468 (D. Md. 1973). In order to determine if plaintiffs have met their burden, the appropriate class which plaintiffs may represent must be determined.

Plaintiffs seek to represent a class consisting of all persons residing in Maryland who now attend or may in the future wish to attend the University of Maryland and who:

> (a) hold or are named within a visa under 8 U.S.C. § 1101(a)(15)-(G)(iv) or are financially dependent upon another person holding or named within such visa; or
>
> (b) pay no Maryland State income tax on a salary or wages from an international organization under the provisions of an international agreement to which the United States is a party or are financially dependent upon another person who does not pay such tax on such salary or wages for such reasons.

Plaintiffs seek declaratory and injunctive relief on behalf of the members of the class.

The thrust of the class aspects of plaintiffs' suit is to force the University to provide an opportunity for

prospective class members to demonstrate Maryland domicile. The court believes that the class which the plaintiffs seek to represent is too broad and must be limited to individuals satisfying criteria (a) above, residing in Maryland, who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish "in-state" status, or who are currently students in senior high schools in Maryland. It is these individuals against whom defendants' policies have already operated or would operate in the near future if they were to continue in effect.

Defendants' proposed limitation of the class to those students, either G-4's or their dependents, who have previously attempted to demonstrate Maryland domicile is too narrow. *Cf. Player v. State of Alabama, Dept. of Pensions and Security,* 400 F. Supp. 249, 253, 259 (M.D. Ala. 1975). Under the University's policy such an attempt would have been futile. Individuals who have been or will soon be discouraged from applying to the University of Maryland because of the University's policies regarding G-4 aliens are appropriate class members. *Cypress v. Newport News General and Nonsectarian Hospital Ass'n,* 375 F.2d 648, 653 (4th Cir. 1967); *Long v. Sapp,* 502 F.2d 34, 43 (5th Cir. 1974); *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 254 (3rd Cir. 1975), *cert. denied* 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679 (1976); *cf. Green v. Cauthen,* 379 F. Supp. 361, 371-2 (D.S.C. 1974).

The court finds no merit in defendants' preliminary argument that plaintiffs have abandoned the class action aspects of this suit. Plaintiffs' motion for class certification, filed on November 18, 1975, in a suit instituted on May 27, 1975, and before any hearings on the merits, was timely and allows the court to determine if class certification is appropriate within the "practicable" time limits of Rule 23(c)(1).



Since elsewhere in this opinion the court has already determined that plaintiffs do have standing to sue on their own behalf, defendants' objection to a class action suit on that ground must also fail. Defendants have not disputed, nor could they, that there are "questions of law . . . common to the class" as required by Rule 23(a)(2) since injunctive and declaratory relief for all the class members depends on the resolution of the same question of law, the legality of the University of Maryland's policy prohibiting G-4 aliens an opportunity to show that they are domiciled in Maryland. For the same reason, plaintiffs have also met the "typical claims" requirement of Rule 23(a)(3). Defendants have not attempted to argue to the contrary on this question. Finally, since plaintiffs' able and diligent counsel have adequately and fairly represented the interest of the class heretofore described and since the plaintiffs do not have interests antagonistic to those of the class, Rule 23(a)(4) has been satisfied. *Oxendine v. Williams,* 509 F.2d 1405 (4th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Co., supra; American Finance System, Inc. v. Harlow,* 65 F.R.D. 94 (D. Md. 1974).

Defendants' major argument in opposition to class certification is that plaintiffs have not satisfied the "numerosity" requirement of Rule 23(a)(1) which requires the plaintiffs to demonstrate that joinder of all members is impracticable. This rule requires plaintiffs to make a positive showing that joinder is impracticable. *Tolbert v. Western Electric Co.,* 56 F.R.D. 108, 113 (N.D. Ga. 1972). Neither bare allegations of numerosity nor speculation as to the number of parties will suffice. *Kinsey v. Legg, Mason & Co., Inc.,* 60 F.R.D. 91 (D.D.C. 1973); *Tuma v. American Can Co.,* 367 F. Supp. 1178 (D. N.J. 1973). However, a plaintiff need not establish a class size with precision; it is sufficient if he presents some information from which the number of class members can be approximated. *Sims v. Parke Davis & Co.,* 334 F. Supp. 774 (D. Mich. 1971), *cert. denied* 405 U.S. 978, 92 S. Ct. 1196, 31 L. Ed. 2d 254 (1972). In this regard, the Advisory

Committee on the Federal Rules of Civil Procedure noted in discussing Rule 23(b)(2):

> ". . . Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose numbers are incapable of specific enumeration . . ." (citations omitted). 39 F.R.D. 73, 102.

Plaintiffs have submitted the affidavits of Arnold Weiss and John D. North (attachments to Paper No. 16) in support of their motion for class certification. Mr. Weiss's affidavit indicates that as of May, 1975, there were "157 children between the ages of 16-25 holding G-4 visas and dependent on and living in homes of Bank employees living in Maryland." Mr. North indicates that, based on a random sample at the end of 1975 of 15% of the World Bank's employees, just under 1,000 employees holding G-4 visas reside in Marylar d. Mr. North, based on hard 1973 data, and ratios based on the 1975 sample, states that "there are today (Jan. 8, 1976), very approximately, nearly 500 dependent children, about one-third of them of the age of 15 or over, living in the homes of World Bank employees who hold G-4 visas and who reside in the State of Maryland." These data are as specific as are required, given the fact that this is a Rule 23(b)(2) class action suit and that plaintiffs have demonstrated the unconstitutionality of the University of Maryland's policies in question here. The court finds that plaintiffs have met the burden imposed on them by Rule 23(a)(1) to demonstrate that the class described *supra* is so numerous that joinder of all members would be impracticable. Therefore the court will grant plaintiffs' motion for class certification for a class to be defined as follows:

> All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who
>
> (a) hold or are named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa.



Declaratory relief is granted to the members of this class and defendants are enjoined from denying to the members of this class in-state status solely because they or their parents are holders of a visa under 8 U.S.C. § 1101(a)(15)(G)(iv).

Since the issue of the domicile of the fathers of the three named plaintiffs remains to be resolved, the court will not decide at this time the question of court costs and attorneys' fees.

Therefore, it is this 13th day of July, 1976, ORDERED:

(1) That defendant University of Maryland's motion for summary judgment is GRANTED and the University of Maryland is dismissed as a defendant in this case;

(2) That defendant Dr. Wilson H. Elkins' motion for summary judgment is DENIED·

(3) That plaintiffs' motion for class action determination is GRANTED and that the class is certified as described in the foregoing opinion;

(4) That plaintiffs' motion for summary judgment is partially GRANTED and partially DENIED;

(5) That the "In-State Policy" of the University of Maryland which denies to G-4 aliens by the use of an irrebuttable presumption of non-domicile the opportunity to establish "in-state" status is unconstitutional as it is in violation of the Due Process Clause of the Fourteenth Amendment; and

(6) That defendant Dr. Wilson H. Elkins is hereby enjoined from enforcing the University of Maryland's "In-State Policy" with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to "in-state" status for purposes of tuition and charge differential determinations.

*In The United States District Court*
*for The District Of Maryland*

---

*Civil Action No. M-76-691*

---

*Juan Carlos Moreno, et al.,*
*Plaintiffs,*

*v.*

*University of Maryland and*
*Dr. Wilson H. Elkins,*
*President, University of*
*Maryland,*
*Defendants.*

ORDER

(Filed August 3, 1976)

The Court having read and considered the Motion to Stay Order Pending Appeal and Memorandum in Support thereof, filed on behalf of Defendant Elkins on July 31, 1976;

And the Court having heard oral argument of counsel for the respective parties in open court on August 2, 1976, at which time it was represented by counsel for Defendant Elkins that were a stay granted (1) the University of Maryland, for the fall 1976 semester and any other semester that commences before the appellate process is concluded, as to each student whose status is currently determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1976 semester,



would have been granted but for the stay, would refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, were finally affirmed on appeal, and (2) the University of Maryland would publicize in some reasonable manner the condition that in order to be eligible to be considered for the refund described above, each student whose status is currently determined by a G-4 visa would be required to file with the University of Maryland a request for reclassification to "in-state" status prior to the last day available for registration for the fall 1976 semester;

And the Court having determined from the foregoing pleadings and arguments that the prerequisites for the granting of a stay pending appeal, stated in *Long v. Robinson,* 432 F.2d 977 (4th Cir. 1970), have been satisfied;

IT IS, this 3rd day of August, 1976, by the United States District Court for the District of Maryland, for the reasons more fully set forth in open court,

ORDERED, That the Motion to Stay Order Pending Appeal be granted as prayed and that the effectiveness of paragraphs (5) and (6) of the Court's Order contained in its Opinion and Order filed July 13, 1976, be, and the same hereby is, STAYED.

s/ JAMES R. MILLER, JR.,
United States District Judge.

*United States Court of Appeals*
*for The Fourth Circuit*

---

*No. 76-2049*

---

*Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg,*
*Appellees,*

*v.*

*Wilson H. Elkins, President, University of Maryland,*
*Appellant,*

*and*

*University of Maryland,*
*Defendant.*

---

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

---

Heard: April 4, 1977
Decided: April 28, 1977.

---

Before WINTER, BUTZNER, and HALL, Circuit Judges.

---

Jack T. Roach and Robert A. Zarnoch, Assistant Attorneys General of Maryland (Francis B. Burch, Attorney General of Maryland, David Feldman, Assistant Attorney General of Maryland on brief) for appellant; Alfred L. Scanlan (R. James Woolsey, John D. Aldock and Shea and Gardner on brief) for appellees.



---

PER CURIAM:

The University of Maryland appeals the district court's ruling that, for purposes of determining admission, tuition rates, and charge differentials, students may not be denied "in state" status solely because they hold G-4 visas. For the reasons lucidly stated by the district court, we affirm that court's judgment. *See* Moreno v. University of Maryland, 420 F. Supp. 541 (D. Md. 1976).

*Affirmed.*

---

*United States Court of Appeals*
*for The Fourth Circuit*

---

*No. 76-2049*

---

*Wilson H. Elkins, President, University of Maryland,*
*Appellant,*

*v.*

*Juan Carlos Moreno, et al.*
*Appellees.*

---

ORDER
(Filed May 23, 1977)

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Winter, Judge Butzner and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II,
Clerk.

---

*United States Court of Appeals*
*for The Fourth Circuit*

---

*No. 76-2049*

---

*Juan Carlos Moreno, Juan Pablo Otero and Clare B. Hogg,*
*Appellees,*

*v.*

*Wilson H. Elkins, President, University of Maryland,*
*Appellant,*

*and*

*University of Maryland,*
*Defendant.*

---

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

---

(Filed May 26, 1977)

Upon consideration of the appellant's motion for stay of mandate,

IT IS ACCORDINGLY ADJUDGED AND ORDERED that the mandate is stayed for a period of thirty (30) days unless the period is extended for cause shown on the same



terms as the district court originally granted its stay namely that should the appellant's petition for writ of certiorari prove unsuccessful, then those members of appellees' class who filed timely requests for reclassification to "in-state" status would receive a refund of excess fees paid during the pendency of the stay.

Entered for the panel consisting of Judges Winter, Butzner and Hall by direction.

For the Court,

WILLIAM K. SLATE II,
Clerk.

---

A True Copy,Test:
William K. Slate, II, Clerk,
By Marilyn J. Kocen,
Deputy Clerk.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-154

WILSON H. ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND,
*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF OF THE COMMONWEALTH OF VIRGINIA, THE STATES OF NORTH CAROLINA, SOUTH CAROLINA, AND WEST VIRGINIA, AND THE AMERICAN COUNCIL ON EDUCATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

ANTHONY F. TROY
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

RUFUS L. EDMISTEN
Attorney General of
North Carolina
Box 629
Raleigh, North Carolina 27602
Attorney for the State
of North Carolina

DANIEL R. McLEOD
Attorney General of
South Carolina
Hampton Office Building
Columbia, South Carolina 29211
Attorney for the State
of South Carolina

CHAUNCEY H. BROWNING
Attorney General of
West Virginia
State Capitol
Charleston, West Virginia 25305
Attorney for the State
of West Virginia

SHELDON ELLIOT STEINBACH
1 DuPont Circle, N.W.
Suite 824
Washington, D. C. 20036
Attorney for the American
Council on Education

The Daily Record Co., Baltimore, Md. 21202

# INDEX

## TABLE OF CONTENTS



## TABLE OF CITATIONS

### *Cases*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-154

WILSON H. ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND,
*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF OF THE COMMONWEALTH OF VIRGINIA, THE STATES OF NORTH CAROLINA, SOUTH CAROLINA, AND WEST VIRGINIA, AND THE AMERICAN COUNCIL ON EDUCATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

### INTERESTS OF AMICI

The interests of amici and their reasons for petitioning this Court to grant certiorari are as follows:

Amici are states and the nation's largest association of colleges and universities. All are vitally concerned with preserving a rational system of tuition rate assignments for students in publicly-supported colleges

and universities in order to ensure the fiscal integrity of these institutions.

Amici are deeply concerned about the ongoing financial crisis in publicly-supported colleges and universities. To assure that effective post-secondary educational programs are provided to the increasing number of potential students who seek enrollment, the amici urge that the Court uphold the rational system of classification imposed by the University of Maryland. The consequences of striking down the classification may ultimately force publicly-supported colleges and universities to charge the same rate of tuition to all students, regardless of state residency or domicile. This would deprive state taxpayers of the direct benefit of their support by raising the cost of education for them and their dependent children. It might require increasing the state tax burden because revenues provided by a uniform tuition rate at present levels would fail to meet a reasonable proportion of an institution's operating costs. In addition, if tuition rates are made uniform at a higher level, needy state residents might be precluded from any higher education because of the higher cost.

Amici seek to preserve an open enrollment policy among state-supported colleges and universities, in order to promote a heterogeneous student body. Judicial elimination of a reasonable system of tuition differentials may eliminate this diversity by provoking "the natural response of States which, having placed high value on universities, having developed great institutions at large cost, believe that other States should do the same and therefore seek ways to keep the institution in being for its own citizens." *Vlandis v. Kline,* 412 U.S. 441, 463 (1973) (Burger, C.J. dissenting).

Amici also seek continuation of this court' recognition of the legitimacy of "[t]he State's objective of cost



equalization between bona fide residents and nonresidents." *Vlandis, supra* at 448. This Court should now facilitate that objective by affirming the right of publicly-supported higher education institutions to classify students in a manner reasonably calculated to achieve that goal.

Amici hope to assure publicly-supported schools the receipt of reasonable tuition revenues. Affirmance of the decision below would enable non-immigrant aliens to reduce their tuition payments by the existing cost differential. Schools with large numbers of such students will feel the cost impact immediately.

Amici maintain that proper application of constitutional principles and the practical consequences of the irrebuttable presumption doctrine warrant overruling *Vlandis v. Kline, supra*, which has been used as a mechanism for overturning countless state legislative judgments. Amici accordingly urge that this Court grant Appellants' petition for certiorari to consider the decision of the lower court.

## QUESTIONS PRESENTED

1. Whether strict judicial scrutiny, in the guise of an irrebuttable presumption analysis which is internally inconsistent and financially deleterious to public colleges and universities, must be applied to a rationally based in-state and out-of-state tuition policy such as that of the University of Maryland and of the great majority of public institutions of higher education in the United States?

2. Whether decisions of this Court have so eroded the irrebuttable presumption doctrine embodied in *Vlandis v. Kline,* 412 U.S. 441 (1973), that this Court should now declare that doctrine overruled?

## ARGUMENT

### THE IRREBUTTABLE PRESUMPTION DOCTRINE OF *VLANDIS v. KLINE SHOULD BE OVERRULED.*

This case raises issues of great importance to states and particularly to their public colleges and universities. The difference between the tuition paid by resident students and those enrolling from out of state represents a vital source of income to these institutions. Nearly five years ago that income was estimated at between $250 and $300 million a year for just 400 public four-year colleges and universities belonging to the National Association of State Universities and Land Grant Colleges and the American Association of State Colleges and Universities. W. Waugh, *Is Out-of-State Tuition Legal?*, 4 Change 22 (Winter 1972-73). Time and inflation have heightened dependency on that income. This Court in *Vlandis v. Kline*, 412 U.S. 441 (1973), while conceding the rationality of the governmental objectives proffered in support of Connecticut's in-state/out-of-state tuition system, held that due process mandated an individualized determination of a student's status to overcome what it contended was an impermissible "permanent irrebuttable presumption of nonresidence." In so doing, a majority of this Court pointed to domicile as a reasonable standard for determining the residential status of a student.

After *Vlandis*, public colleges and universities predicated their tuition policies on student domicile and established elaborate and expensive appeal mechanisms to afford students the individualized determinations they believed to be mandated by this Court. Viewed in the short run, the *Vlandis* decision may have aided a few students deserving of preferential tuition; however, viewed more realistically, the 1973 ruling opened the door to many students who lack even



minimal affinity to the states which bear the financial brunt of their education.

In the present case, the lower courts take *Vlandis* one step further by striking down a rational tuition system based on domicile. The decisions below question a public university's ability to adopt a reasonable determination of domicile consistent with state law, common sense, and decisions of this Court. *See Matthews v. Diaz*, 426 U.S. 67 (1976).

As devastating to educational interests as the result reached by the lower courts in the instant case is the manner in which that result was reached. The irrebuttable presumption doctrine has been denounced by legal scholars since the days of Mr. Justice Holmes. *See Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926). *See also* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 Ind. L. Rev. 644 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 Mich. L. Rev. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 Stan. L. Rev. 449 (1975). And members of this Court have been no less vocal in their criticism.[1]

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), this Court's dissatisfaction with the irrebuttable presumption, doctrine reached new heights when it termed such analysis "a virtual engine of destruction for countless legislative judgments." *Id.* at 772. At issue in that case

[1] Mr. Justice Rehnquist, in dissent, has characterized the doctrine as relying "heavily on notions of substantive due process that have been authoritatively repudiated," Vlandis v. Kline, 412 U.S. 441, 463, and as "in the last analysis nothing less than an attack upon the very notion of lawmaking itself." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 660 (1974). The Chief Justice has criticized the doctrine since Stanley v. Illinois, 405 U.S. 645 (1972), and Mr. Justice Powell expressed concern "about the implications of the doctrine for the traditional legislative power to operate by classification." Cleveland Board of Education v. LaFleur, *supra*, at 652 (concurring opinion).

was a provision of the social security law denying benefits to a surviving wife who was married to a deceased wage-earner for less than nine months prior to his death. The law treated such relationships as shams, a presumption which was permanent and irrebuttable regardless of the evidence of legitimacy that a claimant could provide. In an attempt to distinguish *Vlandis,* the opinion of the Court said that unlike the Connecticut tuition scheme, "the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible." 422 U.S. at 772.

The dissenters were quick to note that there was little if any difference between the scheme at issue in *Vlandis* and *Salfi, id.* at 802-03, and lower courts have been troubled by the question of the effect to be given *Vlandis* after *Salfi.*[2]

The proffered distinction of *Vlandis*, which would have appeared to place a premium on the form of the classification at issue, was quickly laid to rest by this Court in *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976). There, this Court said that the mere fact that a statute was phrased in terms of an irrebuttable presumption would not invalidate a law "when its operation and effect are clearly permissible." *Id.* at 24. More importantly, in every case similar to *Vlandis, i.e.,* where a constitutionally protected interest was not at stake, this Court has rejected or deliberately refused to apply the irrebuttable presumption analysis. *See Knebel v. Hein,* 429 U.S. 288 (1977); *Murgia v. Massachusetts Board of Retirement,* 427 U.S. 307

[2] In Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), the Seventh Circuit took the unusual step of refusing to decide a due process question because "we cannot say whether the irrebuttable presumption doctrine or the substantive analysis followed in *Salfi* would be thought appropriate for this case by a majority of the Supreme Court." *Id.* at 1318-19.



(1976);[3] *Usery v. Turner Elkhorn Mining Co., supra; Skafte v. Rorex,* 553 P.2d 830 (Colo. 1976), *appeal dismissed for lack of a substantial federal question,* 97 S. Ct. 1638 (1977). And in *Fiallo v. Bell,* 97 S. Ct. 1473 (1977), this Court eschewed the irrebuttable presumption analysis even where a fundamental right was at stake.

From this wealth of authority, only one conclusion can be drawn: the legal basis of *Vlandis* already has been eroded substantially by this Court, and it now is time for it formally to be overruled.[4]

[3] *Murgia* is a critical case in the death of the *Vlandis* irrebuttable presumption doctrine. At issue was the constitutionality of a statute setting mandatory retirement for a police officer at fifty, a permanent and irrebuttable presumption if ever there was one. The lower court, in reliance upon Cleveland Board of Education v. LaFleur, found the statute violative of due process. On appeal this Court pointedly ignored the irrebuttable presumption holding below and upheld the statute, applying traditional equal protection analysis.

[4] This Court need only follow the mechanics it employed in Hudgens v. NLRB, 424 U.S. 507 (1976), where it explicitly recognized that Lloyd Corporation v. Tanner, 407 U.S. 551 (1972), had overruled Amalgamated Food Employees Union Local 570 v. Logan Valley Plaza, 391 U.S. 308 (1968).

## CONCLUSION

Because of the deleterious effect of *Vlandis* on a host of state legislative judgments, including rationally based tuition policies of public colleges and universities, and in light of the importance of discarding the irrebuttable presumption doctrine, amici urge that the Court grant the instant petition of University of Maryland President Wilson H. Elkins for the issuance of a writ of certiorari, that the Court reverse the judgment below of the United States Court of Appeals for the Fourth Circuit, and that in so doing the Court overrule *Vlandis v. Kline, supra.*

Respectfully submitted,

ANTHONY F. TROY
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

RUFUS L. EDMISTEN
Attorney General of
North Carolina
Box 629
Raleigh, North Carolina 27602
Attorney for the State
of North Carolina

DANIEL R. McLEOD
Attorney General of
South Carolina
Hampton Office Building
Columbia, South Carolina 29211
Attorney for the State
of South Carolina

CHAUNCEY H. BROWNING
Attorney General of
West Virginia
State Capitol
Charleston, West Virginia 25305
Attorney for the State
of West Virginia

SHELDON ELLIOT STEINBACH
1 DuPont Circle, N.W.
Suite 824
Washington, D. C. 20036
Attorney for the American
Council on Education

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

## No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND

*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED JULY 28, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

## TABLE OF CONTENTS

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

## No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND

*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,

*Respondents.*

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

## RELEVANT DOCKET ENTRIES

5/27/75—(1) Complaint.

6/25/75—(3) Answer.

7/29/75—(4) Request of Plaintiffs for Admissions of Fact.

7/30/75—(5) Interrogatories of Plaintiffs Propounded to Defendants.

8/28/75—(7) Answer of Defendants to Request for Admissions of Fact.

8/29/75—(8) Answers of Defendants to Interrogatories.

10/6/75—(9) Motion of Plaintiffs for Summary Judgment.

11/4/75—(11) Motion of Defendants for Summary Judgment.

11/18/75—(14) Motion of Plaintiffs for Class Action Determination.

4/9/76 Hearing on all Motions before Miller J.

4/9/76 Argued and held sub curia.

7/13/76—(19) Opinion of Court and Order.

7/31/76—(20) Defendant's Motion for Stay of Order.

7/31/76—(20a) Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit.

8/2/76 Hearing on Motion for Stay.

8/3/76—(21) Order Granting Stay.

4/4/77 Argued and held sub curia. In Court of Appeals.

4/28/77 Per Curiam Opinion of 4th Circuit affirming District Court decision.

5/11/77 Appellant's Petition for rehearing and suggestion for rehearing en banc.

5/23/77 Petition for rehearing denied.

5/26/77 Appellant's Motion to Stay Mandate.

5/26/77 Mandate Stayed pending application to Supreme Court for a writ of certiorari.

7/28/77 Petition for a Writ of Certiorari.



## WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

The following items may be found in the Appendix to the Petition for a Writ of Certiorari which was filed with the Petition:

1. Opinion and Order of the District Court.
2. Order Granting Stay.
3. Per Curiam Opinion of U.S. Court of Appeals for the Fourth Circuit.
4. Order denying Petition for Rehearing.
5. Order Staying Mandate of Fourth Circuit.

---

## VERIFIED COMPLAINT
(Filed May 27, 1975)

(Action for Declaratory and Injunctive Relief)

1. This is an action by three aliens, each of whom resides in Maryland, against the University of Maryland and the President thereof, alleging violations of federal statutory and constitutional rights and seeking declaratory and injunctive relief against the defendants' denying plaintiffs in-state status for admission, tuition, and charge-differential purposes (hereinafter usually referred to as "in-state status").

2. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983; Section 1977 of the Revised Statutes of the United States, 42 U.S.C. § 1981; Sections 201, 202, and 204 of Title II of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000a, 2000a-1, and 2000a-3; Section 601 of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d; and the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. The jurisdiction of this Court is founded upon 28 U.S.C. § 1343(3) and (4).

4. Venue is present by virtue of 28 U.S.C. 1391(b).

5. Plaintiffs bring this action on behalf of themselves and all other persons residing in Maryland who attend, or desire to attend, defendant University of Maryland and: (1) who hold visas under 8 U.S.C. § 1101(a)(15)(G)(iv) (hereinafter "G-4 visas"); or, (2) who are financially dependent upon the holder of such a visa; or, (3) who pay no federal, state, or local income tax on wages or salary from an international organization under the provisions of an international treaty to which the United States is a party; or, (4) who are financially dependent upon one who pays no such tax on such wages or salary under the provisions of such a treaty. The number of members of such class is sufficiently numerous that joinder of all members is impracticable. There are questions of law or fact presented herein which are common to the entire class of such persons. The claims of the plaintiffs herein are typical of the claims of such class. The plaintiffs will fairly and adequately protect the interests of such class. Defendants have acted on grounds generally applicable to the class in such a way as to make appropriate final injunctive or declaratory relief with respect to the class as a whole.

6. Plaintiff Juan Carlos Moreno is a native of Paraguay; he has resided in Maryland for fifteen years. He is a student at the University of Maryland.

7. Plaintiff Juan Pablo Otero is a native of Bolivia; he has resided in Maryland for ten years. He is a student at the University of Maryland.

8. Plaintiff Clare B. Hogg is a native of the United Kingdom; she has resided in Maryland for the past five years. She is a student at the University of Maryland.

9. The University of Maryland is a public corporation, chartered under Maryland law, Article 77A § 15(a), Anno. Code of Maryland (hereinafter the "University").

10. Dr. Wilson H. Elkins is the President of the University of Maryland and its chief executive officer (hereinafter the "President").



11. Under Article 77A § 15(e), Anno. Code of Maryland, the Board of Regents of the University "shall exercise with reference to the University . . . all the powers, rights, and privileges that go with the responsibility of management. . . ."

12. On September 21, 1973, the Board of Regents approved a new general policy for the determination of in-state status. Under such general policy the University has denied and continues to deny in-state status to all students who neither are United States citizens nor hold immigrant visas. Students who are United States citizens or who hold immigrant visa may, under such policy, be granted in-state status, if *inter alia*, they are: (a) financially dependent on parents domiciled in Maryland for at least six consecutive months prior to the close of registration for the semester in question, or (b) financially independent for the preceding twelve months and have themselves maintained domicile in Maryland for the above six-month period.

13. As indicated in Exhibit 1, Attachment 9, and Exhibit 3, Attachment 7, attached hereto, defendants have further determined that:

(a) students who are neither United States citizens nor hold immigrant visas may not be granted in-state status regardless of whether such students or their families have established domicile in Maryland;

(b) students whose parents do not pay Maryland income taxes on income earned from an international organization under the provisions of an international treaty to which the United States is a party may not be granted in-state status because of the "principle of cost equalization" and because the University's "policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not"; and

(c) students or their parents who hold G-4 visas are thereby precluded from establishing the requisite intent to establish domicile in Maryland.

14. The University currently requires students other than in-state students to pay significantly higher fees for tuition and other charges, including board charges in some circumstances, and subjects them to more restrictive standards for admission in some circumstances than it does in the case of in-state students.

15. Plaintiffs Moreno, Otero, and Hogg have pursued each and every avenue of administrative review, including an unsuccessful appeal to the President, within the University of Maryland of the University's decision to deny them in-state status, and have exhausted all their administrative remedies, prior to seeking relief in this Court.

16. Documents verifying certain facts relevant to the domicile of plaintiff Moreno's family, all of which were presented to the defendants during the administrative review within the University, are appended hereto as Exhibit 1, Attachments 1 to 9. Plaintiff Moreno's father, Mr. Manuel A. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Manuel Moreno has owned a home in Maryland for the past twelve years. Plaintiff Moreno's mother, Mrs. Gladys M. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa. Manuel and Gladys Moreno own no property in Paraguay, having sold the house which they formerly owned there in 1960. Manuel and Gladys Moreno have paid all Maryland State and Montgomery County property taxes on their home as well as all state and local retail, motor vehicle, fuel, excise and other taxes applicable to them as required by law. Manuel and Gladys Moreno each hold a Maryland driver's license; their automobiles are registered in Maryland. Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years; they have no present intention to reside anywhere other than in the State of Maryland.



17. Manuel and Gladys Moreno are domiciled in the State of Maryland.

18. Plaintiff Moreno has lived with his parents since birth. He has lived in the United States since the age of four, has attended primary and secondary schools in the United States without interruption, and graduated from high school in Maryland. Plaintiff Moreno is a citizen of Paraguay; he now holds a G-4 visa. He holds a Maryland driver's license. He has filed United States and Maryland income tax returns for 1973 and 1974. Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years; he has no present intention to reside anywhere other than in the State of Maryland.

19. Plaintiff Moreno is domiciled in the State of Maryland.

20. Defendants have denied plaintiff Moreno in-state status, thus subjecting him to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Moreno in-state status, defendants have violated and are violating such plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.

21. Documents verifying certain facts relevant to the domicile of plaintiff Otero's family, all of which were presented to defendants during the administrative review within the University, are appended hereto as Exhibit 2, Attachments 1 to 6. Plaintiff Otero's father, Mr. Rene Otero, is a citizen of Bolivia and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Plaintiff Otero's mother, Mrs. Teresa Bailey Otero, is a citizen of the United States; she is registered to vote in Maryland. Rene and Teresa Otero resided in the District of Columbia from the time of their arrival in the United States in 1960 until 1965, when they moved to Maryland. Rene and Teresa Otero have owned a home in Maryland since 1965 and have resided

therein for ten years; they have paid all Maryland State and Montgomery County property taxes thereon as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Rene and Teresa Otero each hold a Maryland driver's license; Rene Otero's automobile is registered in Maryland. Rene and Teresa Otero own no property in Bolivia. Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years; they have no present intention to reside anywhere other than in the State of Maryland.

22. Rene and Teresa Otero are domiciled in the State of Maryland.

23. Plaintiff Otero has lived with his parents since birth. He has lived in the United States since the age of five and has attended primary schools, secondary schools, and college in the United States without interruption. Plaintiff Otero is a citizen of Bolivia; he now holds a G-4 visa; he has made application to adjust his status to that of immigrant. Plaintiff Otero holds a Maryland driver's license. Plaintiff Otero has filed both United States and Maryland income tax returns in 1972, 1973, and 1974, and he has paid income tax to both Maryland and the United States in each of those three years. Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years; he has no present intention to reside anywhere other than in the State of Maryland.

24. Plaintiff Otero is domiciled in the State of Maryland.

25. Defendants have denied plaintiff Otero in-state status, thus subjecting him to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Otero in-state status, defendants have violated and are violating such plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.



26. Documents verifying certain facts relevant to the domicile of plaintiff Hogg's family, all of which were presented to the defendants during the administrative review within the University, are appended hereto as Exhibit 3, Attachments 1 to 9. Plaintiff Hogg's father, Mr. Vincent Hogg, is a citizen of the United Kingdom and is the holder of a G-4 visa; he has been employed by the International Bank for Reconstruction and Development for thirteen years. Plaintiff Hogg's mother, Mrs. Barbara Hogg, and the Hoggs' daughter Susan are citizens of the United Kingdom. Susan Hogg married a United States citizen in 1973 and adjusted her status to that of permanent resident alien. Vincent and Barbara Hogg resided in the District of Columbia from the time of their arrival in the United States in 1962 until 1970, when they moved to Maryland. They have resided in Maryland for five years except as described below. Vincent and Barbara Hogg own their own home in Maryland as well as a house in which they formerly resided in the District; the house in the District is rented. Vincent and Barbara Hogg own no real property in the United Kingdom with the exception of a small condominium apartment which is currently listed for sale with a real estate agent and which it is their present intention to sell as soon as a sale can be consummated. Substantially all of their personal property and investments are here in the United States with the exception of a bank account in a sum equivalent to approximately five hundred dollars maintained by Vincent Hogg in the United Kingdom for the convenience of paying life insurance premiums and professional journal subscriptions; he does not make payments to the United Kingdom's State Pension Fund. Vincent Hogg's will was written in the United States and represents that he resides in Maryland. Vincent Hogg's automobiles are registered in Maryland. Vincent and Barbara Hogg each hold a Maryland driver's license. They belong to the local civic association in the area in which they reside. Vincent and Barbara Hogg have filed joint United States income tax

returns every year since 1963. In 1974 they paid income taxes to both the United States and to the State of Maryland on all income other than Mrs. Hogg's salary from the International Bank for Reconstruction and Development, as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period abroad of approximately nine months as part of Vincent Hogg's employment; they have no intention to reside any where other than in the State of Maryland.

27. Vincent and Barbara Hogg are domiciled in the State of Maryland.

28. Plaintiff Hogg has resided with her parents since birth. She has lived in the United States since the age of seven and has attended primary schools, secondary schools, and college in the United States without interruption, with the exception of the approximately nine-month period described in paragraph 26 above. Plaintiff Hogg is a citizen of the United Kingdom; she now holds a G-4 visa; she holds a Maryland driver's license. Plaintiff Hogg has filed both United States and Maryland income tax returns in 1973 and 1974. Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in paragraph 26 above; she has no present intention to reside anywhere other than in the State of Maryland.

29. Plaintiff Hogg is domiciled in the State of Maryland.

30. Defendants have denied plaintiff Hogg in-state status, thus subjecting her to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Hogg in-state status defendants have violated and are violating plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.



WHEREFORE plaintiffs pray that this Court

(1) Adjudge and declare that the actions of defendants in denying to plaintiffs in-state status for admission, tuition, and charge-differential purposes are unlawful;

(2) Enjoin the defendants to reclassify the plaintiffs as students hiving such in-state status;

(3) Enjoin the defendants from further denying to any student in-state status either partially or wholly on the basis that such student or any parent or person on whom such student is financially dependent: (a) is the holder of a G-4 visa; (b) pays no Maryland State income tax on a salary or wages from an international organization under the provisions of an international treaty to which the United States is a party; or (c) is not domiciled in the State of Maryland by reason of holding such a visa or paying no Maryland State income tax on such salary or wages under the provisions of such a treaty.

(4) Grant to plaintiffs costs, reasonable attorneys' fees, and such other relief as may be proper.

Dated: May 27, 1975

Signatures omitted

---

**Exhibit 1, Attachment 9**

UNIVERSITY OF MARYLAND

March 19, 1975

Mr. Alfred L. Scanlan
Shea & Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Scanlan:

This is to acknowledge your letter of February 24, 1975. I have reviewed the material relating to "out-of-state" classification of Juan C. Moreno and Juan P. Otero, and I concur in the decision of the Intercampus

Review Committee. I am, therefore, denying your appeal.

It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as "out-of-state."

The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 non-immigrant visa preclude establishing the requisite intent necessary for Maryland domicile. Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland, and because of the underlying principle of cost equalization, I am denying the requests for reclassification.

Sincerely yours,

WILSON H. ELKINS,
President.



**Exhibit 3, Attachment 9**

UNIVERSITY OF MARYLAND

May 14, 1975

Mr. Alfred L. Scanlan
Shea & Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Scanlan:

This is to acknowledge your letter of April 30, 1975 appealing the decision of the Intercampus Review Committee concerning the classification of Ms. Clare B. Hogg as an out-of-state resident. I have reviewed all of the material concerning her appeal, and I concur in the decision of the Intercampus Review Committee that she be classified as an out-of-state resident.

It is the policy of the University of Maryland to grant-in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. The University's classification policy distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 non-immigrant visa preclude establishing the requisite intent necessary for Maryland domicile.

This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes and those who do not.

In reviewing this case, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Ms. Hogg as out-of-state.

Sincerely yours,

WILSON H. ELKINS,
President.

## ANSWER

(Filed June 25, 1975)

Defendants, University of Maryland and Dr. Wilson H. Elkins, President, University of Maryland, by Francis B. Burch, Attorney General of Maryland, Estelle A. Fishbein, David H. Feldman, and Jack T. Roach, Assistant Attorneys General, their attorneys, in answer to the Verified Complaint* filed herein, state:

### First Defense

This Honorable Court lacks jurisdiction over the subject matter of the rights of action alleged in the Complaint.

### Second Defense

This Honorable Court lacks jurisdiction over the person of Defendants University of Maryland and Dr. Wilson H. Elkins, in his capacity as President, University of Maryland.

### Third Defense

The Complaint fails to state a claim upon which relief can be granted.

### Fourth Defense

The Complaint fails to state a claim as a class action upon which relief can be granted.

### Fifth Defense

The Complaint fails to state a claim upon which class relief can be granted.

### Sixth Defense

The Complaint fails to join parties under Rule 19 of the Federal Rules of Civil Procedure.

---

* Although "Verified," the Complaint need not have been since no temporary restraining order was sought, *see* FED. R. CIV. P. 65(b), and thus the verification is of no effect, *see* FED. R. CIV. P. 11.



### Seventh Defense

Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, lack standing to bring the rights of action alleged in the Complaint.

### Eighth Defense

Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, are not proper parties plaintiff to the Complaint.

### Ninth Defense

No case or controversy exists between Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, on the one hand, and Defendants, University of Maryland and Dr. Wilson H. Elkins, in his capacity as President, University of Maryland, on the other hand.

### Tenth Defense

This Honorable Court should abstrain from exercising any jurisdiction it may possess in this action until it shall have been heard and determined fully by the courts of Maryland.

### Eleventh Defense

1. Defendants deny the allegations contained in paragraph 1 of the Complaint, except that Defendants admit that Plaintiffs are aliens.

2. Defendants deny the allegations contained in paragraph 2 of the Complaint.

3. Defendants deny the allegations contained in paragraph 3 of the Complaint.

4. Defendants admit the allegations contained in paragraph 4 of the Complaint.

5. Defendants deny the allegations contained in paragraph 5 of the Complaint.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint, except that Defendants admit that Plaintiff Juan Carlos Moreno is a student at the University of

Maryland and deny that Plaintiff Juan Carlos Moreno has resided in Maryland for fifteen years.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint, except that Defendants admit that Plaintiff Juan Pablo Otero is a student at the University of Maryland and deny that Plaintiff Juan Pablo Otero has resided in Maryland for ten years.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint, except that Defendants admit that Plaintiff Clare B. Hogg is a student at the University of Maryland and deny that Plaintiff Clare B. Hogg has resided in Maryland for the past five years.

9. Defendants admit the allegations contained in paragraph 9 of the Complaint.

10. Defendants admit the allegations contained in paragraph 10 of the Complaint.

11. Defendants admit the allegations contained in paragraph 11 of the Complaint.

12. Defendants admit the allegations contained in paragraph 12 of the Complaint, except that Defendants deny that the University has denied and continues to deny in-state status to all students who neither are United States citizens nor hold immigrant visas.

13. Defendants deny the allegations contained in paragraph 13 of the Complaint and all subparts thereof, except that Defendants admit that they have determined that students or their parents who hold G-4 visas are precluded from establishing the requisite intent to establish domicile in Maryland.

14. Defendants deny the allegations contained in paragraph 14 of the Complaint.

15. Defendants admit the allegations contained in paragraph 15 of the Complaint.



16. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint, except that Defendants admit that copies of the documents, appended to the Complaint as Exhibit 1, Attachments 1 to 9, were presented to Defendants during the administrative review within the University, and deny that Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years and that they have no present intention to reside anywhere other than in the State of Maryland.

17. Defendants deny the allegations contained in paragraph 17 of the Complaint.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint, except that Defendants deny that Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years and that he has no present intention of residing anywhere other than the State of Maryland.

19. Defendants deny the allegation contained in paragraph 19 of the Complaint.

20. Defendants deny the allegations contained in paragraph 20 of the Complaint.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint, except that Defendants admit that copies of the documents, appended to the Complaint as Exhibit 2, Attachments 1 to 6, were presented to Defendants during the administrative review within the University, and deny that Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years and that they have no present intention to reside anywhere other than in the State of Maryland.

22. Defendants deny the allegations contained in paragraph 22 of the Complaint.

23. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint, except that Defendants deny that Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years and that he has no present intention to reside anywhere other than in the State of Maryland.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint.

25. Defendants deny the allegations contained in paragraph 25 of the Complaint.

26. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, except that Defendants admit that copies of the documents, appended to the Complaint as Exhibit 3, Attachments 1 to 9, were presented to Defendants during the administrative review within the University, and deny that Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period of approximately nine months as part of Vincent Hogg's employment, and that they have no present intention to reside anywhere other than in the State of Maryland.

27. Defendants deny the allegations contained in paragraph 27 of the Complaint.

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the Complaint, except that Defendants deny that Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in paragraph 26 above, and that she has no present intention to reside anywhere other than in the State of Maryland.

29. Defendants deny the allegation contained in paragraph 29 of the Complaint.



30. Defendants deny the allegations contained in paragraph 30 of the Complaint.

WHEREFORE, Defendants respectfully pray that:

(1) The relief requested in the Complaint be denied.

(2) All costs of these proceedings be assessed against Plaintiffs.

Signatures omitted.

---

## PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed October 6, 1975)

NOW COME the plaintiffs, through undersigned counsel, to move the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor, namely that this Court:

(1) Adjudge and declare that the actions of defendants in denying to plaintiffs in-state status for admission, tuition, and charge differential purposes are unlawful;

(2) Enjoin the defendants to reclassify the plaintiffs as students having such in-state status;

(3) Enjoin the defendants from further denying to any student in-state status either partially or wholly on the basis that such student or any parent or person or whom such student is financially dependent: (a) is the holder of a visa under 8 U.S.C. 1101(a)(15)(G)(iv); (b) pays no Maryland State income tax on a salary or wages from an international organization under the provisions of an international agreement to which the United States is a party; or (c) is not domiciled in the State of Maryland by reason of holding such a visa or paying no Maryland State income tax on such salary or wages under the provisions of such an agreement.

(4) Grant to plaintiffs costs, reasonable attorneys' fees, and such other relief as may be proper.

2. If summary judgment is not rendered in plaintiffs' favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action are just.

This motion is based upon the Verified Complaint, on the exhibits and attachments thereto, and on the affidavits filed herewith.

Pursuant to Rule 6 of the Rules of this Court, plaintiffs request a hearing on this motion for summary judgment.

(Signatures omitted)

---

AFFIDAVIT OF ARNOLD H. WEISS

DISTRICT OF COLUMBIA SS:

Arnold H. Weiss, being first duly sworn, deposes and states as follows:

1. I am the General Counsel of the Inter-American Development Bank, a public international organization located in Washington, D.C. I am fully familiar with the personnel policies of the Bank and the legal requirements related thereto.

2. Article VIII, Section 5(e) of the Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397 provides that "[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographic basis as possible."

3. Title 1, Section 101(a) of the Immigration and Nationality Act provides for a separate visa classification for officers, or employees of international organizations, and members of their immediate families. 8 USC Sec. 1101 (a)(15)(G)(iv).



4. Pursuant to the matters referred to in paragraphs 2 and 3 above, it is the policy of the Bank not to assist any of such persons in adjusting or otherwise changing their visa status from that provided under 8 USC Sec. 1101(a)(15)(G)(iv) to any other visa status.

5. No authorized representative of the Bank files, signs, or otherwise approves U.S. Department of Labor form MA7-50A (Statement of Qualifications of Alien) or MA7-50B (Job Offer for Alien Employment); or to my knowledge has ever done so.

6. The three attachments are copies of letters from the files of the Inter-American Development Bank:

(A) May 20, 1965, letter from Dr. Wilson H. Elkins, President of the University of Maryland, to Mr. Paul A. Colborn, Chief of the General Legal Division of the Pan American Union;

(B) December 27, 1965, letter from Mr. Roy M. Walsh, of the Inter-American Development Bank to Mr. G. Watson Algire, Director of Admissions of the University;

(C) January 7, 1966, letter from Mr. Algire to Mr. Walsh, responding to (B) above.

ARNOLD H. WEISS

---

May 20, 1965

Mr. Paul A. Colborn, Chief
General Legal Division
The Pan American Union
Washington 6, D. C.

Dear Mr. Colborn:

Since receiving your letter of April 13 we have been considering the tuition rates for employees of international organizations. I note from your letter that no income tax, federal or state, is levied on the salaries of non-citizen employees of certain international organizations, and in each case this is by virtue of a treaty. You also say that liability for the state income tax varies

with the jurisdiction and that all alien employees of international organizations are exempted from the tax in the State of Maryland.

The tuition rate at the University of Maryland is determined mainly by domicile. Since this is the case, we have decided that it would be fair to all parties concerned to classify in accordance with domicile: that is, for minors, the parents must own (personally) and occupy property in the State of Maryland for a period of six months before residency status will be granted. For the adult, the same will hold. This ruling is not to be considered retroactive. I believe that this interpretation of our resident and non-resident status is proper and that it will be fair to the employees of the Pan American Union and other international organizations.

With kindest regards, I am

Sincerely yours,

WILSON H. ELKINS,
President.

---

December 27, 1965

Mr. G. Watson Algire
Dean of Admissions
University of Maryland
College Park, Maryland

Dear Dean Algire:

Last Tuesday, I spoke to Mrs. Will in regard to the attached letter and she recommended that I write to you. My purpose is to receive confirmation from the University of Maryland that the ruling on classification of non-citizen employees in accordance with domicile, as contained in the attached letter, is also applicable to that category of employees in this Bank. Further, I understand that this ruling is applicable to both tuition and boarding rates.

The Inter-American Development Bank is an international organization of which all the members are



governments. It was established and is operating under the Agreement Establishing the Bank signed by these governments (copy attached). Article XI of the Agreement establishes, among other things, certain privileges and immunities for officials and employees of the Bank, including immunity from taxation. The United States of America became a member of the Bank pursuant to the Inter-American Development Bank Act (Public Law 86-147, copy attached). Section 9 of said Act gives full force and effect in the United States to Article XI of the Agreement. The privileges and immunities of the International Organization Privileges and Immunities Act were extended to the Inter-American Development Bank by virtue of Executive Order 1033, April 8, 1960, copy attached.

Should you require any additional information, please do not hesitate to let me know. In the meantime, I thank you for your consideration of this matter and hope that the information contained herein proves sufficient for you to make a decision.

Sincerely yours,

ROY M. WALSH,
Office of Personnel

---

January 7, 1966

Mr. Roy M. Walsh
Office of Personnel
Inter-American Development Bank
Washington 25, D. C.

Dear Mr. Walsh:

I am replying to your letter of December 27 concerning the classification of Maryland residence for fee-paying purposes at the University.

If you will recall, you enclosed a copy of a letter dated May 20, 1965 from Dr. Wilson H. Elkins to Mr. Paul A. Colborn, Chief, General Legal Division, The Pan American Union. The intent of this decision is to grant Maryland residence status for fee-paying purposes at

the University of Maryland to those employees of international organizations who are living in the State of Maryland and are in this country on a G4 visa only. This is, of course, granted in the case of minors provided the parents personally own and occupy property in the State of Maryland for a period of six months before such residence status is granted. The same privilege is extended to adults.

I hope this answers the questions raised in your letter of December 27.

Sincerely yours,

G. WATSON ALGIRE,
Director of Admissions
and Registrations

---

## AFFIDAVIT OF HUGH N. SCOTT

DISTRICT OF COLUMBIA SS:

Hugh N. Scott, being first duly sworn, deposes and states as follows:

1. I am Assistant General Counsel of the International Bank for Reconstruction and Development in Washington, D.C. I am fully familiar with the personnel policies of the Bank and the legal requirements related thereto.

2. Article V, Section 5(d) of the Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502 provides that "[i]n appointing the officers and staff, the President shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographic basis as possible." Pursuant to this requirement for some years it has been neither the policy nor the practice for the Bank to assist any of its employees in adjusting or otherwise changing their visa status from one in which such employee holds a visa under 8 U.S.C.



1101(a)(15)(G)(iv) to one in which he holds an immigrant visa; thus neither the Bank nor its authorized representative files, signs, or otherwise approves U.S. Department of Labor form MA7-50A (Statement of Qualifications of Alien) or MA7-50B (Job Offer for Alien Employment).

HUGH N. SCOTT.

---

## AFFIDAVIT OF R. JAMES WOOLSEY

R. JAMES WOOLSEY, being first duly sworn, deposes and states as follows:

1. I am a member of the bar of the District of Columbia, associated with the firm of Shea & Gardner, 734 Fifteenth Street, N.W., Washington, D. C. 20005, and one of the attorneys for plaintiffs in this action. This affidavit is submitted in support of plaintiffs' motion for summary judgment.

2. I have obtained from the parents of each of the three plaintiffs the total real estate taxes for the calendar year 1975 paid by each family on the home which each owns and in which each now lives in Maryland.

3. The average of the three figures indicated in paragraph 2 above is $1,362.

R. JAMES WOOLSEY

iii. *Temporary Employees with contracts for 6 months or more but less than one year*

Payment will be made only for those authorized dependents who accompany or join the employee at his post of duty within a period of time that does not exceed ½ of the remaining contract period.

362. DEPENDENCY ALLOWANCE

In accordance with the practice of other international organizations in adopting a net-of-tax salary structure to meet the needs of employees with varying dependency status, the Bank grants a dependency allowance to eligible employees for the spouse and other dependents who meet the requirements established below.

Regular employees, the Controllers of the Group of Controllers of the System of Review and Evaluation, Sectorial Specialists and Assistants to Executive Directors, are eligible for dependency allowance for their dependents recognized by the Bank.

When both husband and wife are employed by the Bank, only one of them may be eligible for dependency allowance.

The following dependents are recognized as such by the Bank, when the requisites indicated below are fulfilled:

*Spouse*

a) The gross annual income of the spouse must be less than $10,000 and must not exceed the employee's basic salary.

For purposes of this policy "gross annual income" shall mean salaries, wages, fees, income from investments, etc. In those cases wherein the spouse by virtue of working for another international organization, etc., receives a net income, such income will be converted to gross by the Bank by means of



determining the federal, state and local taxes, in a manner similar to that used for U.S. staff members at Headquarters, and adding this figure to the net income.

b) If the employee and spouse reside in separate domicilies, the employees must contribute more than half of the spouse's support. The requirements in a) above also apply.

c) If the employee is legally separated from the spouse, he will not be entitled to dependency allowance for said spouse.

*Children*

Each single child or adopted single child of the employee or spouse, who receives more than half of the total financial support from the employee or his spouse, and who is one of the following categories:

1. Less than 19 years of age.
2. Less than 25 years of age and a full-time student (not less than 20 classroom hours of attendance per week or 12 credit hours per semester) in an institution of higher learning (college or university, or a trade, technical, or business school all of which require graduation from high school as a prerequisite for admission).
3. Physically or mentally incapacitated and therefore incapable of self-support.

*Other Dependents*

An eligible single employee will be entitled to a dependency allowance for each one of his parents, and an eligible married employee for only one of his parents or one of his parents-in-law. However, the parent's gross annual income, regardless of source, must be less than $1,200 and the eligible employee and/or his spouse must contribute more than half the financial support. Furthermore, the parent(s) must meet one of the following conditions:

1. Resides permanently in the employee's household.

2. Be a patient in an institution or a resident in a home for the aged.

Dependency allowance will be granted to those eligible employees for their dependents who fulfill the requisites and limitations above, and will be $675 annually for spouse; $400 annually per child; and $275 annually for other dependents.

An eligible employee who does not have a spouse, or is legally separated and does not receive a dependency allowance for a spouse, may receive $675 instead of $400 for one child who meets the requisites.

*Payment of Dependency Allowance*

Payment of annual dependency allowance is made on a prorated basis every month except for the month of entering or leaving the service of the Bank when it is prorated according to the exact number of days concerned.

Date of entitlement for payment will be the first day of the month immediately following the month during which the request is presented and approved, except in the case of newly born children. In such situation, payment will commence on the first day of month following the month of birth, provided the request is presented within 3 months of birth.

Payment of dependency allowance will cease on the last day of the month in which the dependent ceases to meet any one of the requisites.

*Adjustments (Spouse and/or Parent (s))*

The definite entitlement to the dependency allowance benefit arises at the time when the annual income of the spouse, father and/or mother is known with certainty for the calendar year. As there is a right to receive provisional payments prorated monthly and charged to this allowance, it is recognized that during the course of the year the employee exercises the right to receive this allowance on the estimated base of the gross income of the spouse or of the father or mother.



Consequently, there can be unforeseen changes to the estimated income, during the calendar year, which can affect the right of the employee to receive the annual allowance, and which can only be known at the end of that year. Should this happen, the employee has the obligation of notifying the Bank of the variation in the income within 10 days following the close of the calendar year. In those cases where the limits established for the gross annual income have been exceeded, the amount of the dependency allowance received by the employee during the calendar year, based on provisional payments, must be reimbursed to the institution within the same number of months that the payments had been received. However, the case may happen wherein an employee who has not received provisional payments for dependency allowances, due to the expectation that the spouse, father or mother would have a higher income than that established for the right to this allowance, finds that at the end of the calendar year such income did not exceed the established limits. In this case, upon the application of the employee, the Bank must pay the dependency allowance due for the calendar year, unless the employee has not completed the full year of service with the Bank, in which case, the appropriate proportionate amount will be paid.

363. POST ADJUSTMENT

The real income of international employees at the same level should be similar throughout the different offices of the Bank.

Consequently the Bank establishes a post adjustment directly related to the salary level of each employee, taking in consideration the two basic factors which affect the level of real income of employees outside of Headquarters: cost of commodities and services and cost of housing.

Regular employees and temporary employees (Sectorial Specialists and Consultants) who work full-time in offices outside of the Headquarters are eligible with the

exception that, consultants with an employment contract for less than 12 months and those whose duties require them to stay in several countries thereby prohibiting them from establishing a permanent residence will not be eligible for post adjustment.

*Scope*

Post adjustment is a payment made to eligible employees to compensate for the negative effect produced by higher costs of commodities and services and/or housing at their posts of duty as compared to the Bank's Headquarters.

Post adjustment payments will be considered in the computation of income tax reimbursements established by the Bank.

The factors which determine the need and/or amounts of post adjustment are the following:

*Cost of Commodities and Services*

Computation of this factor will be based on the current difference between the commodities and services index at the Bank's Headquarters, which is used as the basis, and that of the countries in which the offices are located.

This factor does not include costs for housing or education.

*Housing Costs*

Computation of this factor will be based on the current difference between average housing costs related to salary levels at the Bank's Headquarters, and the real costs incurred by the employee for this purpose, limited to the maximum average housing costs related to salary levels as established for the country is which the Bank's offices are located.

The basis for the computation of these two factors will be the commodities and services index and the average housing costs for the different cities of the world, as published in the country in which the Headquarters of the Bank is located.

* * * * * *



For example, a child attends school for only one-half of the academic year within a calendar year, the employee would then be entitled to 75% of the cost of tuition and transportation up to a maximum of $500 (one-half of the $1,000 for a full academic year).

*Appointment, Change in Post of Duty or Termination occurring during the calendar year*

When for the reasons mentioned, an employee does not complete a calendar year of service as an eligible employee, the amount of the grant will be the proportion that the period of schooling of the dependent children has to the full academic period within the calendar year.

*Tuition and Transportation*

The amount of the reimbursement will only cover the costs of tuition and transportation for schooling. Not to be reimbursed are such other costs as room and board, tutelage, part-time education, books, registration, etc.

364. A Higher Education Allowance — Experimental Program

I. Introduction

It is a primary goal of the Bank, in keeping with one of its most important purposes, to provide for staff training with a view to subsequently having trained persons engage in development tasks in their own countries.

Accordingly, within that frame of reference and in addition to the policies of the Bank now in effect — policies that support and stimulate the maintenance of bonds between the employee and his family and his or her country of origin — the higher education allowance is now established, on an experimental basis, to enable expatriate employees to obtain reasonable assistance to finance the education of their eligible dependents whenever such education, pursuant to the purposes of the Bank, is intended to preserve the bonds with the country of origin and to facilitate subsequent readjustment of the family group to the country of origin.

II. Eligible Employees

The following persons are eligible for the allowance: regular staff, the Controllers of the Evaluation and Review System, assistants to the Executive Directors and sectorial specialists who have been assigned to a country other than their country of origin, provided that at Bank headquarters the employees are in possession of a G(iv) visa and that in the field they are not nationals or residents of the country to which they are assigned.

III. Eligible Dependents

An eligible employee may apply for the allowance for each one of his children who is recognized as an authorized dependent in accordance with Personnel Policy #362 provided that the dependent will be less than 24 years of age when school commences.

IV. Location of the Institution of Learning

The allowance applies only if the institution of learning is located in the country of origin of the employee and that country is a member of the Bank.

In exceptional cases when in the country of origin of the employee the careers, courses of instruction or field of specialization to be followed by the eligible dependent are unavailable, a different country may be allowed provided it is not the country to which the employee is assigned, and provided the country is a member of the Bank and has the same national language as that of the country of origin of the employee.

V. Nature of the Institution of Learning

The allowance applies only to full-time study to obtain a professional degree in duly recognized institutions of higher learning in the country.

The expressions *full-time* and *institution of higher learning* are defined in item 2 of subheading "Children" of Personnel Policy #362.



VI. Amount of the Allowance

The allowance is limited to 75% of reimburseable costs, with a maximum of US$1,500 for each complete academic year for each eligible dependent.

## THE WORLD BANK GROUP PERSONNEL MANUAL STATEMENT

## EDUCATION BENEFITS

### I. OBJECTIVE

(1) The basic objective of the World Bank Group's education benefits policy is to provide reasonable assistance to expatriate staff members who face *additional* expenditures as a result of the need to educate their children in a manner intended to facilitate their eventual return to their home country.

### II. DEFINITIONS

A. *Staff Member*

(2) For the purpose of this Policy Statement, *staff member* means a person holding a Regular Fixed-term, Technical Assistant or Secondment Staff appointment as defined in Personnel Manual Statement No. 2.00, Recruitment and Appointment.

B. *Child*

(3) *Child* means the staff member's son or daughter (or, stepson or stepdaughter) who resides in the staff member's household and on whose account the staff member is eligible for a dependency allowance under Personnel Manual Statement No. 3.10, Dependency Allowance. The eligibility of a child not residing in the staff member's household and for whom the staff member is eligible for a dependency allowance will be determined by the Director of Personnel, taking into account the circumstances of the individual case.

C. *Home Country*

(4) *Home country* means the country to which the staff member is granted home leave under Personnel Manual Statement No. 3.45, Home Leave.

D. *Mother Tongue*

(5) *Mother tongue* of the staff member means an official language of the home country.

* * * * * *

Education benefits are provided with respect to the following types of education:

(a) *Primary or Secondary Education*

A child who is in full-time attendance at a recognized primary or secondary level educational institution anywhere in the world qualifies for education grant benefits. In addition, where such attendance is in a country other than that of the duty station, travel benefits are provided.

(b) *Higher Education*

A child who is in full-time attendance at a university (or other recognized institution of higher education) either in the home country or in a country other than that of the duty station where it is determined by the Bank Group that the language and system of education are substantially the same as in the home country qualifies for education grant and travel benefits.

(c) *Instruction in Languages and Specified Subjects*

In addition to the benefits set out in sub-paragraph (a) above, where applicable, education grant benefits are provided for bona fide instruction in:

(i) the mother tongue of the staff member, or language of instruction of the public schools in the duty station country, provided that the child is attending a public or other accredited school in the duty station country and that the staff member's mother tongue is different from the language of instruction of the public schools in the duty station:



(ii) specified subjects required to enable resumption of education in the home country when instruction in such subjects is not provided at the public school which the child is attending in the duty station country.

(d) *Apprenticeship*

A child who is serving a recognized apprenticeship (or under articies recognized by a professional body) either in the home country or in a country other than that of the duty station where it is determined by the Bank that the language and system of education are substantially the same as in the home country qualifies for travel benefits.

E. *Cost of Attendance*

(6) The *cost of attendance* means the cost of the education of a child to a staff member including the cost of enrollment registration, prescribed text books, courses, laboratory fees, examination and diploma fees but excluding all other fees and charges such as local transportation, uniforms, lunches and charges for boarding.

F. *Income*

(7) *Income,* when used with reference to a staff member means the staff member's Bank Group net salary and dependency allowance income when used with reference to the staff member's spouse minus the spouse's income used for purposes of dependency allowance.

## III. RESPONSIBILITY

(8) The Director of Personnel is responsible for the interpretation and administration of this policy, including determination of a staff member's eligibility for education benefits and authorization of appropriate entitlement as provided in this Statement.

(9) The Administrative Expense Division, Controller's Department is responsible for making payment in accordance with the authorization of the Director of Personnel.

(10) The Travel and Shipping Division, Administrative Service Department is responsible for making arrangements for travel and shipment in accordance with the authorization of the Director of Personnel.

(11) Staff members are responsible for promptly reporting to the Director of Personnel any changes affecting their eligibility for, and entitlement to, education benefits.

## IV. ELIGIBILITY

(12) A staff member whose official duty station is outside the home country shall be eligible for education benefits provided that, if stationed at Headquarters, the staff.

* * * * * *

(13) The age limit for education benefits is 22. However, if a child reaches the 22nd birthday after the commencement of an academic year, benefits will be provided through the end of that academic year. In the case of a child whose education is interrupted for at least twelve months by national service or illness, the period of eligibility shall be extended by the period of interruption.

(14) There is no eligibility for benefits under this Statement with respect to:

(a) attendance at a kindergarten or any school below the primary level;

(b) correspondence courses and private tutoring except as provided in sub-paragraph (12)(e) above.

(15) As eligible staff member will receive full entitlement to education benefits in accordance with



Section V below provided that in the case of a married staff member:

(a) the spouse's income for the calendar year preceding the commencement of the academic year for which education benefits are claimed does not exceed $8,000 gross; or

(b) if the spouse's income exceeds $8,000 gross, the staff member's share of the combined net income of the staff member and the spouse for the calendar year preceding the commencement of the academic year for which education benefits are claimed is 50% or more.

(16) If the spouse's income exceeds that of the staff member and is more than $8,000 gross, the entitlement calculated in accordance with Section V below will be reduced at the rate of 3% for each percentage point by which the staff member's income is less than 50% of the combined net income of the staff member and the spouse.

## V. TYPES OF BENEFITS

### A. *Education Grant Benefit*

(17) Subject to the provisions of Section IV above, a staff member is entitled to an education grant benefit (up to an *overall* maximum in respect of each child of $1,500 per academic year) as follows:

(a) for attendance at an educational institution in the country of the duty station — 75% of the cost of attendance;

(b) for attendance at an educational institution outside the country of the duty station — 75% of the cost of attendance plus;

(i) where board is provided by the institution, 75% of the cost of board or

(ii) if board is not provided by the institution and the child does not live with a parent, a subsistence grant of $650:

(c) for instruction as specified under sub-paragraph (12)(c) above, 75% of the cost of such instruction.

(18) When a child is not in attendance at the educational institution for the full period of the academic year, or when the period of service of the staff member is less than the full period of the academic year, the amount of education grant will be pro-rated on the proportion of the period of attendance or service to the full academic year. In such cases, the maximum grant will also be pre-rated in the same manner. For this purpose, a fraction of a full month consisting of 15 days or more will be considered as a full month and a fraction of a full month consisting of less than 15 days will be disregarded.

(19) Where private instruction in languages or specified subjects covered by provisions of the Education Benefits Policy is undertaken during a period between the end of one academic year and the commencement of another, the cost of such instruction will be included in the cost of attendance for the succeeding academic year.

B. *Travel Benefits*

(20) Subject to the provisions of Section IV above a staff member whose child is being educated outside the duty station country is entitled in addition to the education grant benefit, where applicable, to a travel benefit with respect to travel between the educational institution and the child's residence under the terms and conditions set out below, however, travel between the educational institution and the staff member's home in the home country may be allowed in the calendar year in which the staff member takes home leave in lieu of travel between the educational institution and the duty station.

(21) Except as provided in paragraphs (22) and (26) below, the child is entitled to a one-way trip at Bank Group expense at the beginning of each academic year, provided that the child will be in full-time attendance at the educational institution for at least the first six months of the academic year; and the child is entitled to a one-way trip at Bank Group expense at the end of each academic year, provided that the child has been in



full-time attendance at the educational institution for at least the last six months of the academic year. Actual travel need not be undertaken strictly at the time the entitlement arises, provided that it is undertaken during the course of the same academic year.

(22) When the period of service of the staff member falling within the academic year is less than six months travel benefits for that academic year will be limited as follows:

(a) if the period of service falling within the academic year is between three and six months * * *.

(b) if the period of service falling within the academic year is less than three months-no education travel.

(23) Subject to paragraph (24) below, the Bank Group will meet the actual cost of transportation and other expenses set forth below by the most direct route between the educational institution and the duty station or between the educational institution and the home country:

(a) Cost of transportation by any mode but not to exceed the cost by less than first class air or, where no air facilities exist, first class rail:

(b) Reasonable incidental expenses;

(c) For long journeys a per diem of $20 for each overnight stop taken en route up to the maximum number of overnight stops set forth in the Annex to Personnel Manual Statement No. 205, Relocation on Appointment;

(d) Cost of excess baggage up to the limit provided for first class air transportation;

(e) Cost of a separate shipment of personal effects of up to 130 lbs. gross by air freight, or 250 lbs. gross by sea.

(24) When the cost of travel between the educational institution and the duty station is greater than that

between the duty station and the home country, any additional cost of transportation and other expenses must be borne by the staff member. However, this paragraph does not apply when such a change has resulted from the staff member's change of duty station.

(25) Staff members, on a resident assignment outside Europe and North America, whose children attend an educational institution outside the duty station country may opt for a travel benefit in accordance with paragraphs (20) through (24) above for their children to visit the duty station or one parent to visit the child at the educational institution.

(26) A child who enjoys a travel benefit under the provisions of this Section is not eligible in the same calendar year for travel under Personnel Manual Statement No. 3.45, Home Leave. Where a child who travels under the provisions of this Section accompanies other members of the family travelling on home leave, the child will be entitled to the same class of accommodations as applicable to other members of the family.

## VI. PROCEDURE

(27) At the beginning of the academic year, staff members may apply for an advance against their entitlement to education grants on the basis of the estimated expenses for the full academic year. In order to apply for an advance education grant or travel benefit, the Application for Education Benefits form (No. 279) must be submitted to the Personnel Services Section. Normally, no more than one advance will be considered for each child each academic year. A staff member who has received an advance education grant or travel benefit must submit a Certificate of School Attendance and Expenditure form (No. 677) not later than three months after the end of the academic year or on termination of employment, if earlier. Where the actual cost differs from the estimated expense, an appropriate adjustment will be made. A staff member who has not applied for an advance may apply for an



education grant at the end of the academic year (but not later than six months after the end of the academic year) by submitting Forms No. 279 and No. 677.

## VII. TRANSITIONAL PROVISIONS

(28) Notwithstanding the provision of paragraph (12) above, the eligibility for education benefits will be retained in case of:

(a) Staff members in Levels A through I who were appointed prior to January 1, 1974 and who were in U. S. permanent resident status as of that date;

(b) staff members in Levels J and above who held U. S. permanent resident status prior to January 1, 1954 and who have been continuously in the employ of the Bank Group since that date.

---

# UNIVERSITY OF MARYLAND — POSSIBLE ADJUSTMENTS OF TUITION AND OTHER CHARGES

---

The University of Maryland has long differentiated between individuals who are "resident" (domiciled) in the State of Maryland and individuals who are "non-resident" in the state for purposes of admitting students and charging amounts for tuition and other fees. This is a policy common to most, perhaps all, public universities in the United States. At the University of Maryland, students who are determined to be residents of Maryland are referred to as having "in-state" status; others are in "out-of-state" status.

Beginning in 1974, the University limited eligibility for in-state status to students who are (or students whose spouse or parents are) United States citizens or who are admitted to the United States for permanent residence on immigrant visas. Three students who are G-iv visa holders or whose parents are G-iv visa holders

commenced litigation against the University to contest the validity of these limitations. On July 13, 1976, the United States District Court for the District of Maryland decided that a rule which prevented G-iv visa holders from demonstrating that they were domiciled in Maryland was invalid by reason of the due process clause of the United States Constitution, and directed that the rule not be enforced.

The University has decided to appeal this decision to the United States Court of Appeals for the judicial circuit which includes Maryland. Because the appeal is not frivolous, the District Court, following procedures used frequently, has suspended enforcement of its own decision until the appeal is decided. This means that students who are classified as out-of-state by reason of G-iv status will continue to be treated as out-of-state unless and until the decision of the District Court is affirmed by the Court of Appeals.

However, if the decision of the District Court is affirmed, the University will refund the difference between the out-of-state and in-state tuition and other charges for all semesters beginning with the fall 1976 semester if the student would have been classified as in-state for those semesters under the District Court's decision and if the student applies to the Director of Admissions at the University for reclassification from out-of-state to in-state before the last day available for registration for the fall 1976 semester. On receipt of such application, the University will reply that the request will be held in abeyance pending the outcome of the appeal.

If you reside in the State of Maryland and if you or your spouse or child is classified as an out-of-state student by reason of G-iv visa status, the student should apply for reclassification to in-state status before the time indicated.

Staff members who, under the provisions of Personnel Manual Circular No. Pers/6/76 of April 26, 1976, are eligible for the Bank's tuition equalization subsidy



with respect to the education of their dependent children at the University of Maryland must submit to the Personnel Department the following documentation in order to obtain the appropriate reimbursement from the Bank:

(a) Receipted bills for the tuition paid;

(b) Copies of the application to the Director of Admissions of the University for a reclassification from out-of-state to in-state status, and the Director of Admission's reply thereto; and

(c) Documentation from the University of Maryland listing the resident and non-resident tuition charges.

If the amounts reimbursed to the staff member by the Bank are ultimately refunded by the University, the staff member will, of course, be required to repay the Bank.

August 16, 1976

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

ALFRED L. SCANLAN
JAMES R. BIEKE
734 Fifteenth Street, N.W.
Washington, D.C. 20005
*Attorneys for Respondents*

*OF COUNSEL:*
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

September 16, 1977

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

*Cases:*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-154**

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

## OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit (Pet. App. 54a), affirming the District Court's decision, is reported at 556 F.2d 573 (1977).

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTIONS PRESENTED

1. Whether the courts below correctly held that the University of Maryland's policy which adopts state domicile as the basis for awarding the lower, in-state rates for tuition and fees, but refuses to allow aliens holding non-immigrant "G-4" visas to show Maryland domicile for that purpose, violates the Due Process Clause.

2. Whether the decision below can in any event be supported on (a) the alternative ground that the University's policy toward G-4 aliens violates the Equal Protection Clause, or (b) the further alternative ground that the policy intrudes in areas reserved for federal regulation, in violation of the Supremacy Clause.[1]

## CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions set forth in the Petition, this case involves Article VI, Cl. 2 (Supremacy Clause) of the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[1]These issues involving the Equal Protection and Supremacy Clauses were raised in the respondents' complaint in the District Court and were briefed and argued there. However, since the trial judge ruled in the respondents' favor on the due process question, those issues were not decided either in that court or by the Fourth Circuit, which summarily affirmed the trial court's decision. Those points, however, may properly be raised by the respondents in opposing the Petition for Certiorari. *Dandridge v. Williams*, 397 U.S. 471, 475 (1970); *Langes v. Green*, 282 U.S. 531, 535-539 (1931); and see Stern & Gressman, *Supreme Court Practice* 314-315 (4th ed. 1969).



## STATEMENT OF THE CASE

The respondents are three students attending the University of Maryland. They reside in Maryland with their parents, upon whom they are financially dependent. Their fathers are employees of international organizations— two employed by the Inter-American Development Bank ("IDB") and the third employed by the International Bank for Reconstruction and Development ("World Bank") — and as such hold non-immigrant alien visas issued pursuant to 8 U.S.C. §1101(a)(15)(G)(iv), known as "G-4 visas."[2]

The respondents entered the University as freshmen in the fall of 1974. Their applications for "in-state" tuition rates were denied on the basis of a policy adopted by the University in September 1973. Under that policy, as the petitioner states, "the University . . . bases its award of in-state status on domicile" (Pet. 4). Its policy document contains a general definition of domicile[3] and lists eight non-exclusive criteria for determining domicile (Pet. App. 3a-4a). The University denies in-state rates to students who are, or are financially dependent upon, non-immigrant aliens — including holders of G-4 visas — because it presumes that such non-immigrant aliens "cannot have the requisite legal intent to establish Maryland domicile" (Pet. 5).[4]

[2]G-4 visas are those issued to "[o]fficers or employees of . . . international organizations [covered under the International Organizations Immunities Act, 22 U.S.C. 288], and the members of their immediate families."

[3]That definition is as follows:

> "A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time." Pet. App. 3a.

[4]Prior to September 1973, the University had also based the grant of in-state tuition rates on Maryland domicile, but had drawn no distinction between American citizens or permanent immigrants and aliens holding G-4 visas, so long as the parents of the student applicant had owned or occupied property in Maryland for six months prior to the grant of in-state status.

We note, in particular, that one of the University's listed criteria for determining domicile is the payment of "Maryland income tax on all earned income" (Pet. App. 4a), and the international agreements establishing the IDB and the World Bank preclude both the Federal Government and the States from collecting income taxes on the salaries received by non-American employees of those organizations.[5]

After unsuccessfully exhausting their administrative appeals within the University, the respondents filed a class action in the District Court on May 27, 1975, alleging that the University's denial of in-state status to G-4 visaholders and their children violated the Due Process, Equal Protection, and Supremacy Clauses of the Constitution.[6] On July 13, 1976, the District Court ruled in the respondents' favor, holding that G-4 visaholders are not legally incapable of establishing Maryland domicile and that for the University, which bases its in-state rates on domicile, to presume conclusively that they are so incapable, without providing them the opportunity for a hearing on the question, is in these circumstances a denial of due process under *Vlandis v. Kline*, 412 U.S. 441 (1973), and similar cases.[7] The Fourth Circuit affirmed that ruling on April 28, 1977.

The particular facts with respect to each of the respondents are set forth in the District Court's opinion (Pet. App. 12a-15a).

---

[5]See Agreement establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4379; and Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502. The employees of these banks cannot waive this tax exemption. 40 Op. Atty. Gen. 131, 172-73 (1953).

[6]The District Court ultimately certified the suit as a proper class action (Pet. App. 50a).

[7]Although the District Court stayed the effect of the judgment, it required the petitioner and the University to agree to a refund for the class represented by the respondents if the respondents prevailed on appeal. The same condition applies pending decision in this Court.



Generally, they show that the respondents are children of long-time employees of the two international organizations, and that the parents of the respondents have resided in Maryland and owned real estate in that State for periods of time varying from over 7 to over 15 years. The facts also establish that the respondents' parents have paid all Maryland taxes except taxes on their salaries as employees of the IDB or the World Bank. The taxes paid include local real estate taxes, the state sales tax, motor vehicle, fuel, excise and other taxes, and in some cases federal and state income taxes on income other than salaries from the two international banks. Two of the respondents attended elementary and secondary schools in the United States without interruption. The mother of one of the respondents is a citizen of the United States and is registered to vote in Maryland. All of the respondents' parents have their automobiles registered in Maryland. The respondents' fathers hold their positions with the banks on a long-term, indefinite basis; their employment is not for a fixed term or period of time. During the course of the appeal proceedings before University officials, the respondents and their parents stated that they have no present intention to reside anywhere other than in Maryland.

We should also point out that the University has admitted that, under its policy on determining in-state tuition status, an *immigrant* alien could show Maryland domicile even if he was exempt from Maryland income tax (Pet. App. 42a). However, in order for a G-4 alien or any non-immigrant alien who plans to work in the United States (other than one closely related to an American citizen or immigrant alien, such as parent or spouse) to change his visa status to that of immigrant, he must obtain the certification of the Secretary of Labor that there are not sufficient workers in the United States who are able, willing, qualified, and available to perform that work, and that this employment will not adversely affect the working conditions of American workers. 8 U.S.C. §1182(a)(14). With certain exceptions inapplicable here, obtaining such a certification requires the alien's employer

to file a form relating to the alien's qualifications and a form containing a job offer to the alien. 29 C.F.R. 60.3(e)(1) and (2) (1976). The IDB and the World Bank do not file such forms for several reasons. First, Congress has established a special visa category for the employees of international organizations and their families. Next, the banks are unable to make a job offer under the statute since they are "international organizations," not United States employers, and thus cannot certify, as required by the prescribed job offer form, that they have looked for and cannot find United States citizens who are equally qualified. Finally, the agreements establishing the two banks require that "due regard" be paid "to the importance of recruiting the staff on as wide a geographical basis as possible";[8] and the banks interpret this provision, and the establishment by Congress of a separate visa category for aliens working for international organizations, as precluding them, except in very exceptional situations (such as in the case of an employee about to retire), from assisting staff members in efforts to become immigrants in the United States while such persons are employed by the banks. The respondents have no control over these policies of the IDB and the World Bank.

## REASONS FOR DENYING THE WRIT

The respondents submit that a writ of certiorari should not issue in this case because the decision below was correct and is not in conflict with any decisions of this Court or with those of any other circuit. As we will demonstrate, this Court's decision in *Vlandis v. Kline, supra*, was left unimpaired by *Weinberger v. Salfi*, 422 U.S. 749 (1975), and other subsequent decisions of this Court; and *Vlandis* controls the result here. In any event, as

[8]Art. VIII, §5(e), 10 U.S.T. 3029, T.I.A.S. No. 4397; Art. V, §5(d), 60 Stat. 1440, T.I.A.S. No. 1502.



we will also show, the decision below can be supported on the alternative grounds that the University's policy in question (1) denies equal protection of the laws to a group of aliens under the principles most recently applied in *Nyquist v. Mauclet*, ____ U.S. ____ , 45 U.S.L.W. 4655 (1977), and (2) interferes unlawfully with international agreements to which the United States is a party and with the Federal Government's plenary power over immigration and naturalization. Finally, we will show that no compelling considerations of public policy exist to support the grant of the writ in this case.

### I.

### The Courts Below Correctly Held That the University's Policy at Issue Violates the Due Process Clause, and That Ruling Raises No Conflict with Other Decisions.

In the courts below, the respondents argued successfully that the result in this case is controlled by this Court's decision in *Vlandis v. Kline, supra*. That case held unconstitutional a Connecticut statute which set up a mechanical and automatic bar, quite similar to the University's policy here, that prohibited certain students from showing residence in the State for purposes of obtaining in-state rates for tuition and fees at the state university. The Connecticut statute established a presumption that a student was a non-resident, and thus barred him from showing that he had established domicile in Connecticut, if he had a legal address outside the State, if single, during the year before he applied or, if married, at the time of his application. This Court held that it was a denial of due process to establish such a presumption and to deny an applicant the right to prove that his domicile was within the State either at the time of application or at a subsequent time during the period of his

attendance at the University. The Court stated:

> "It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category. Indeed, in the present case, both appellees possess many of the indicia of Connecticut residency, such as year-round Connecticut homes, Connecticut drivers' licenses, car registrations, voter registrations, etc. . . . ." 412 U.S. at 448.

The Court summarized its holding as follows:

> "In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." 412 U.S. at 452.

The present case is very similar to *Vlandis*. The University admittedly purports to be concerned with domicile in allocating the rates for its tuition and fees.[9] Yet it has erected an irrebuttable presumption that the holders of G-4 and other non-immigrant visas may never be domiciled in Maryland for purposes of obtaining in-state tuition and fee status.[10] It makes no attempt to distinguish between those G-4 aliens (or other non-immigrant

[9]See Pet. 4, stating that the University "bases its award of in-state status on domicile"; Pet. App. 32a, where the District Court noted that, according to the defendants, "domicile is the basis on which tuition rates are determined"; and Pet. App. 41a, where the District Court itself referred to the determination of domicile as the "crucial determination" under the University's policy.

[10]See Pet. 4, 5, and 19, where the petitioner states that the University has concluded that non-immigrant aliens are legally disabled from having the requisite intent to acquire Maryland domicile. See also Pet. App. 11a, 17a.



aliens) who may intend to reside indefinitely in Maryland and thus, under the properly considered indicia, would be considered domiciled there, and those who do not so intend. Rather, it simply denies the in-state rates to all such non-immigrant aliens on the basis of a conclusive presumption that they are not Maryland domiciliaries.

The petitioner contends that the controlling impact of *Vlandis* as a precedent in the case at bar was undercut by this Court's subsequent decision in *Weinberger v. Salfi, supra* (Pet. 11-13). Contrary to the petitioner's contention, however, the *Salfi* decision did not undermine the continued viability of *Vlandis*, but specifically distinguished that decision and preserved it as a precedent in an appropriate case, such as the one at bar. In *Salfi*, the Court, speaking through Mr. Justice Rehnquist, upheld the provision of the Social Security Act which defines "widow" and "child" so as to exclude surviving wives and stepchildren from survivors benefits when those wives and stepchildren had their respective relationships to a deceased wage earner for less than nine months prior to his death. The Court distinguished, but did not overrule, *Vlandis* as follows:[11]

> "In *Vlandis v. Kline*, a statutory definition of 'residents' for purposes of fixing tuition to be paid by students in a state university system was held invalid. *The Court held that where Connecticut purported to be concerned with residence, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue.*
>
> * * *

[11]The Court in *Salfi* also distinguished, but preserved, two other cases involving unconstitutional irrebuttable presumptions — *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). The Court stated that, unlike the claims involved in those cases, a non-contractual claim to receive funds from the federal treasury enjoys no constitutionally protected status, although, of course, there may not be invidious discrimination among such claims. 422 U.S. at 771-72.

"Unlike the statutory scheme in *Vlandis* . . . , *the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible.* . . . [T]he benefits here are available upon compliance with an objective criterion, on which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. . . . [A]ppellees are completely free to present evidence that they meet the specified requirements. . . ." (emphasis added). 422 U.S. at 771, 772.[12]

In drawing this distinction, the Court made clear that while a State may condition benefits upon compliance with an objective criterion on which individuals can present evidence, it may not, consistent with due process, condition benefits upon a factual test that it deems to be crucial — such as residency in *Vlandis*, fitness as a parent in *Stanley v. Illinois*, 405 U.S. 645 (1972), and fault in driving in *Bell v. Burson*, 402 U.S. 535 (1971) — and then preclude individuals from presenting relevant evidence that they meet that test. As thus drawn by the Court, the line of distinction resembles closely the traditional line which marks off,

[12]In making the last two statements, the Court analogized the case before it to *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). In that case, the court had upheld the validity of a state university's one-year residency requirement for in-state status, which students could meet while in student status and after which time the students could present evidence of in-state residence. As the Court in *Salfi* recognized, that policy made the in-state rates available upon compliance with an objective criterion, evidence of which the students were free to present, rather than making the in-state rates available upon compliance with a certain factual test (residency) and then precluding certain students from presenting evidence that they met that test. Moreover, as recognized in *Vlandis* (412 U.S. at 452-53 n. 9) and as discussed below, the regulation in *Starns* allowed students to meet the one-year residency requirement while in student status. By contrast, the statute in *Vlandis* prohibited the students involved from ever rebutting the presumption of nonresidence during the entire time they remained in student status. The University's policy here likewise prohibits G-4 aliens from ever rebutting the presumption of non-domicile during the entire time they remain in G-4 status.



on the one side, impermissible invasions of or departures from procedural due process and, on the other side, the now judicially discredited challenges to legislative or administrative choices which before 1937 often had prevailed under the guise of substantive due process. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). Mr. Justice Rehnquist's language in dissent in *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 524 (1973), points up the constitutional difference between irrebuttable presumptions which trespass upon procedural due process and valid legislative limitations operating for the protection of the public in areas of economic regulation:

". . . There is a qualitative difference between, on the one hand, holding unconstitutional on procedural due process grounds *presumptions which conclude factual inquiries without a hearing on such questions* as fault, *Bell v. Burson*, 402 U.S. 535 (1971), the fitness of an unwed father to be a parent, *Stanley v. Illinois*, 405 U.S. 645 (1972), or, accepting the majority's characterization in *Vlandis v. Kline*, 412 U.S. 441 (1973), *residency*, and, on the other hand, holding unconstitutional a duly enacted prophylactic limitation on the dispensation of funds which is designed to cure systemic abuses." (Emphasis added.)

In short, it is clear that the decision in *Salfi*, while admittedly putting a limit on the outer reach of the irrebuttable presumption doctrine, left that doctrine standing in circumstances such as those involved in *Vlandis* and in the present case — namely, that even where no constitutionally protected right is involved, a State may not purport to be concerned with a particular fact and then erect a presumption that concludes the inquiry into that fact by preventing the individual seeking to prove that fact from introducing plainly relevant evidence of it.

That is precisely what the University has done here. In allocating its rates for tuition and fees, it purports to be concerned with domicile — defined in its statement of policy — as the test for in-state rates.[13] Yet at the same time, it denies to a

[13]See references cited in note 9, p. 8, *supra*.

group of individuals seeking to meet that test, G-4 visaholders, any opportunity to show factors clearly bearing on that issue — namely, whether they and their parents are domiciled in Maryland under the University's own definition of domicile. By thus establishing an irrebuttable presumption concluding, without a hearing, the inquiry into the fact that the University deems crucial, the University's policy at issue here falls within the class of irrebuttable presumptions which were condemned in *Vlandis* and which *Salfi* made clear are still invalid.[14]

This Court's decisions subsequent to *Salfi*, also cited by the petitioner (Pet. 13-14), likewise do not undermine the continued viability of *Vlandis* or its applicability to this case. The Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976), in upholding a congressional enactment providing that miners with complicated black lung disease were considered to be totally disabled and thus entitled to compensation, distinguished *Vlandis*. It noted that the effect of the challenged provision in the case before it — to provide compensation for complicated black lung disease — was precisely the Congress' intention and, of course, clearly permissible; and in any event it limited its holding to statutes "regulating purely economic matters," such as those in *Salfi*. *Id.* at 23-24. In *Knebel v. Hein*, 429 U.S. 288 (1977), unlike *Vlandis*, the regulations, under which a transportation allowance was included in income for food stamp purposes, did not purport to be concerned with a particular factual question and then conclude the inquiry into that fact; and hence, as the Court stated, they did not "embody

[14]That the Court in *Salfi* left standing the irrebuttable presumption doctrine in the kinds of cases distinguished in that opinion is confirmed by the Court's decision, subsequent to *Salfi*, in *Turner v. Department of Employment Security*, 423 U.S. 44, 46 (1975), where the Court struck down an irrebuttable presumption "virtually identical" to that held invalid in *LaFleur*. In the present case, as we have shown, the University's irrebuttable presumption is virtually identical to that struck down in *Vlandis*.



any conclusive presumption." *Id.* at 297. Similarly, in *Fiallo v. Bell*, 430 U.S. ____, 45 U.S.L.W. 4402 (1977), the challenged sections of the federal immigration laws contained no such conclusive presumption, but simply excluded the relationship between an illegitimate child and his natural father from the special immigration status accorded children or parents of American citizens or permanent resident aliens. In any event, the Court in *Fiallo* based its decision to uphold those sections on the Congress' traditional plenary power over immigration, which is "largely immune from judicial control." 45 U.S.L.W. at 4403.[15]

Moreover, in applying *Vlandis* to the present case, the decision of the courts below does not conflict with the lower court decisions cited by the petitioner (Pet. 14-15) — namely, *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of subst. federal question*, ____ U.S. ____, 45 U.S.L.W. 3690 (1977); *Mogle v. Seiver County School Dist.*, 540 F.2d 478 (10th Cir. 1976); *Sellers v. Ciccone*, 530 F.2d 199 (8th Cir. 1976); and *Fisher v. Secretary of HEW*, 522 F.2d 493 (7th Cir. 1975). Each of those cases involved a flat, objective requirement or prohibition, rather than an irrebuttable presumption of the type involved in *Vlandis* and in the present case. For example, in upholding a statutory ban against voting by aliens in school elections, the court in *Skafte* explained:

> "The statutes do not purport to be concerned with prohibiting from voting persons with some common trait, which trait is conclusively presumed from the status of alienage. Instead, the statutes only purport to exclude aliens from voting. Thus, they do not create a conclusive presumption." 553 P.2d at 833.

[15]In their brief as amici curiae (pp. 6-7), the Commonwealth of Virginia et al. also cite *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). That case, too, however, involved a flat legislative requirement — that police officers must retire at age 50 — rather than any irrebuttable presumption purporting to be concerned with a particular fact and then concluding the inquiry into that fact.

The court in *Mogle*, in upholding a residency requirement for teachers, made the same point:

> "In [*Vlandis*], in effect, a fact question was identified and then decided by a conclusive presumption. . . .
>
> "In our case, the residency requirement does not involve such identification of a controlling fact question and decision of it by an irrebuttable presumption." 540 F.2d at 484-85.

The same was true of the prison policy in *Sellers*, which required long-term inmates to be within ten years of a release date in order to be eligible for a certain training program, and of the social security provision in *Fisher*, which conditioned benefits for domestic workers on their having minimum earnings from a single employer for a certain number of quarters.

Thus, no decision either by this Court or by any other court contradicts the applicability of *Vlandis* here, on almost the same general set of facts, in accordance with the distinction drawn in *Salfi* and followed in subsequent cases.

The petitioner attempts to distinguish *Vlandis* on the ground that the students there "could never qualify for in-state status," whereas here the University's presumption of non-domicile for G-4 visaholders "is not permanent," since G-4 students could qualify if they (or their parents if the students are financially dependent) "alter their immigration status to that of permanent resident alien" (Pet. 16). In this connection, the petitioner relies on *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971), where the court upheld a one-year residency requirement which allowed students from out of State to present evidence of in-state residence after living in the State for one year. This attempted distinction of *Vlandis* cannot stand up. Contrary to the petitioner's contention, the students in *Vlandis could* have qualified for the in-state rates by moving to Connecticut for a year before applying to the university or by dropping out of the university for a year, living in Connecticut for that year, and then reapplying. Such a possibility of a change in



status could not save the irrebuttable presumption in *Vlandis*, for the presumption was permanent for as long as the students remained in student status. By contrast, the regulation in *Starns* allowed students to meet the one-year residency requirement while in student status. No change in status was required. The University of Maryland's policy at issue here is like that in *Vlandis* rather than that in *Starns*. Its irrebuttable presumption of non-domicile is permanent for as long as the students or their parents remain in G-4 status. The fact that they might change their status in order to avoid the presumption, as the students in *Vlandis* could have done, cannot cure the constitutional defect.[16]

Similarly, the petitioner's contention that the interests asserted in support of the University's challenged policy are sufficient to justify that policy (Pet. 17-18) must fail. In the courts below, the petitioner advanced the interests of cost equalization on the basis of past financial support to the State and of administrative convenience. As the courts below recognized (Pet. App. 41a), *Vlandis* makes plain that those interests will not support an irrebuttable presumption of the type involved here. See 412 U.S. at 448-52. The petitioner now also asserts that, since an interest in limiting governmental expenditures to those with a greater affinity to the United States was sufficient to justify a congressional classification among aliens in *Mathews v. Diaz*, 426 U.S. 67, 83 (1976), it can justify the University's policy here as well. In *Mathews*, however, the Court based its decision squarely on the Congress' plenary power over aliens, which is for the most part "committed to the political branches of the Federal

[16]Moreover, for reasons discussed on p. 6, *supra*, the IDB and the World Bank do not file the forms necessary for their employees to adjust their visa status from G-4 to permanent resident. Hence, the requirement that G-4 visaholders so change their status in order to be eligible for in-state rates at the University would impose an arbitrary and unreasonable burden on such individuals. See *Robertson v. Regents of University of New Mexico*, 350 F. Supp. 100, 101-102 (D. N.Mex. 1972); *accord Covell v. Douglas*, 501 P.2d 1047, 1048 (Colo. 1972).

Government," *id.* at 81; and it made clear that the considerations and policies applicable in that area do not apply to *state* actions affecting aliens, *id.* at 84-87. In *Nyquist v. Mauclet*, 45 U.S.L.W. 4655, 4568 (1977), the Court confirmed explicitly that the "national affinity" interest "is not a permissible one for a State."[17]

In sum, the respondents submit that *Vlandis* has been preserved as invalidating irrebuttable presumptions that offend procedural due process — as distinguished from the implicit legislative assumptions necessary to make a statutory scheme work properly in areas of economic regulation — and that the University of Maryland's irrebuttable presumption of non-domicile for G-4 visaholders falls squarely within the class of those invalid under *Vlandis*.[18]

[17]The petitioner also suggests — though he doesn't clearly argue — that the University's conclusive presumption of non-domicile for G-4 aliens should have been upheld because it is universally true (Pet. 19-21). We note, however, that the question whether G-4 aliens are legally capable of establishing a domicile in Maryland for purposes of obtaining the in-state rates is a question of the interpretation of the law of domicile and of the federal immigration laws respecting G-4 visas — matters on which the opinion below is thorough and adequate to answer the petitioner's suggestion (Pet. App. 32a-41a).

[18]The amici curiae Commonwealth of Virginia et al. ask this Court to grant certiorari here in order to overrule *Vlandis*. For the reasons we have stated, the respondents believe that the holding in *Vlandis* was correct, and has been properly preserved, as applied to the fact situation in that case and in the present case as well. In any event, this case is not an appropriate one for reexamining the holding in *Vlandis*, since the University's policy at issue here, unlike that in *Vlandis*, involves and discriminates against *aliens* and as such, for the reasons shown in Part II below, is unconstitutional under the Equal Protection and Supremacy Clauses, regardless of the due process considerations discussed in *Vlandis*.



## II.

## The Decision Below Can Be Supported On Other Grounds.

### A. The University's Policy Denies Equal Protection to a Class of Aliens.

The respondents argued below that the University's policy of flatly prohibiting G-4 visaholders from showing Maryland domicile denied them equal protection of the laws. While the courts below found it unnecessary to reach that question, we reassert the argument here as an alternative ground for denying a writ of certiorari.[19]

This Court's decision last Term in *Nyquist v. Mauclet, supra*, 45 U.S.L.W. at 4657, reaffirmed its prior holdings that "classifications by a State that are based on alienage are 'inherently suspect and subject to close judicial scrutiny,'" citing, *inter alia, Graham v. Richardson*, 403 U.S. 365, 372 (1971), *In re Griffiths*, 413 U.S. 717, 731 (1973), and *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). *Nyquist* involved a provision of a New York statute which barred state financial assistance for higher education to aliens who had neither applied for United States citizenship nor submitted a statement of intent to do so. New York contended that the statute "should not be subjected to strict scrutiny because it does not impose a classification based on alienage," but distinguishes "only within the 'heterogeneous class of aliens' and 'does not distinguish between citizens and aliens *vel non*.'" 45 U.S.L.W. at 4657. This Court rejected that argument, pointing out that the statute "is directed at aliens and only aliens are harmed by it. . . . [and] the fact that the statute is not an absolute bar [against aliens generally] does not mean that it does not discriminate

[19]See note 1, p. 2, *supra*.

against the class." *Id.* Likewise, in *Graham v. Richardson, supra*, the Court had struck down an Arizona statute that did not prohibit *all* aliens from obtaining welfare benefits, but only those who did not meet a durational residency requirement.

Similarly, in the present case, the University's policy barring G-4 and other non-immigrant aliens from ever showing Maryland domicile discriminates against that class of aliens by subjecting them to a restriction not faced by American citizens and immigrant aliens similarly situated. Thus, that classification is inherently suspect and subject to strict scrutiny. The petitioner has conceded, in his brief filed in the Fourth Circuit (p. 32), that the interests purportedly underlying the University's policy "will not withstand a 'strict scrutiny' Equal Protection standard . . . ." As relevant decisions of this Court show, the petitioner was clearly correct in that conclusion. See, *e.g., Shapiro v. Thompson*, 394 U.S. 618, 632-633 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 266 (1974).[20]

[20]Even if the University's policy of flatly prohibiting G-4 visaholders from showing Maryland domicile could be said not to trigger the strict scrutiny standard, it would still be void under the Equal Protection Clause. The policy draws a distinction between aliens holding G-4 visas and aliens holding immigrant visas. That distinction is essentially arbitrary and lacks a reasonable basis, and hence denies equal protection under the traditional "reasonable basis" standard. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). There is no relationship between, on the one hand, the holding of a G-4 rather than an immigrant visa and, on the other, an individual's intent to establish his domicile in Maryland. Additionally, there is no relationship between the holding of a G-4 rather than an immigrant visa and any alleged interest of the University in "cost equalization" based on tax contributions. Even if a G-4 employee of the IDB or the World Bank was able to change his visa status to that of an immigrant, the State still could not, because of international agreements and the federal statutes implementing such agreements, levy the state income tax on his income from the bank. Yet the University has admitted that, in such a case, it would allow the immigrant alien to show Maryland domicile, whereas it prohibits G-4 aliens from doing so, despite the fact that the two situations are the same so far as achieving or not achieving the State's purported purpose of "cost equalization" is concerned.



### B. The University's Policy Violates the Supremacy Clause.

The decision below can also be supported on another ground raised by the respondents in the trial court though not reached by that court — namely, that the University's policy intrudes in areas reserved for federal regulation, in violation of the Supremacy Clause of the Constitution. It is established that, under that Clause, States may not interfere with international agreements or rights thereunder, *United States v. Belmont*, 301 U.S. 324, 331 (1937), *United States v. Pink*, 315 U.S. 203, 230-31 (1942), or encroach upon the exclusive federal power over, and policies involving, immigration and naturalization, *Graham v. Richardson, supra*, at 376-80, *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). The University's policy at issue here imposes on non-immigrant employees of the IDB and the World Bank restrictions not imposed on citizens and immigrants, and thus, we submit, interferes with the operation of the international agreements under which those banks were established and their foreign employees came to this country. Similarly, by imposing such peculiar restrictions on non-immigrant aliens, by conditioning their right to show Maryland domicile on their changing their immigration status to permanent resident, and by thus providing a financial incentive for them to change their visa status, the University has unlawfully intruded into the immigration field — an area occupied by the Federal Government because it is "one of the most important and delicate of all international relations," *Hines v. Davidowitz, supra*, at 64. These considerations, too, demonstrate the inappropriateness of granting certiorari in the present case on the question presented by the petitioner.

## III.

### No Compelling Policy Considerations Support the Grant of Certiorari.

In seeking certiorari, the petitioner claims that the decision below casts a cloud on the tuition policies of most public universities and colleges and may have a serious impact on the federal estate tax law (Pet. 19). Neither contention is valid.

The decision below is unlikely to have any extensive impact on public universities generally. The record does not reveal, and the respondents are unaware of, any other American public university or college which has adopted a domicile test for in-state tuition status and, at the same time, precludes the holders of G-4 visas from ever showing that they meet that test. Moreover, the issues presented here affect a limited number of people — primarily the holders of G-4 visas, whose children, for the most part, attend public universities and colleges in the Washington, D.C., and New York City areas, the two locales where international organizations have their headquarters in this country and where their employees reside.[21]

In claiming that the decision below may have consequences in federal estate tax law, the petitioner cites a single revenue ruling by the Internal Revenue Service, Rev. Rul. 74-364, 1974-2 C.B.

[21]The four States and the association which have filed a brief as amici curiae do not claim that their public universities have a policy like that of the University of Maryland or have significant numbers of G-4 students. Rather, their concern is based on their apparent belief that the decision below could "force publicly-supported colleges and universities to charge the same rate of tuition to all students, regardless of state residency or domicile" (p. 2). They state further that that decision "would enable non-immigrant aliens to reduce their tuition payments by the existing cost differential" (p. 3). These concerns are plainly groundless. The decision below in no way undermines the validity of a differential between in-state and out-of-state tuition rates. Nor does it automatically entitle non-immigrants to in-state rates. It simply requires the University to allow G-4 visaholders the *opportunity*, already afforded to citizens and immigrant aliens, to *show* domicile in the State.



321 (Pet. 20). That ruling held that the holder of a G-4 visa was not domiciled in the United States for federal estate tax purposes. The ruling, however, relied on two cases which, as the District Court demonstrated in detail, are clearly distinguishable on their facts from the present case (Pet. App. 39a-40a). These flimsy foundations for the revenue ruling cited by the petitioner emphasize the need for confining it to its own facts, even if it is assumed to be correct in that limited context. Moreover, residency for tax purposes is notoriously variable. In that connection, the United States Tax Court has recently held that an employee of the IDB — a citizen of Chile and a holder of a G-4 visa, who had resided in the United States since 1966 — was a resident alien for tax purposes and therefore entitled to file a joint income tax return with his wife claiming their children and his wife's mother as dependents. *Escobar v. Commissioner*, 68 T.C. 304 (1977). The Tax Court there noted that, even assuming that the stay of G-4 visaholders in the United States was limited by the immigration laws to a definite period, those aliens could nevertheless be residents of the United States for income tax purposes. Contrary to the petitioner's contention, therefore, the tax decisions collectively "establish that the immigration status of an alien does not conclusively determine whether [he] is a resident of the United States." *Brittingham v. Commissioner*, 66 T.C. 373, 414 (1976).

## CONCLUSION

For all these reasons, the respondents urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

ALFRED L. SCANLAN
JAMES R. BIEKE
734 Fifteenth Street, N.W.
Washington, D.C. 20005
(202/737-1255)
*Attorneys for Respondents*

*Of Counsel:*
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

IN THE

# Supreme Court of the United States

OCTOBER TERM 1977

## No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF OF PETITIONER

FRANCIS B. BURCH,
Attorney General
of Maryland,
GEORGE A. NILSON,
Deputy Attorney General
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
ROBERT A. ZARNOCH,
Assistant Attorney General,
1400 One South Calvert Building,
Baltimore, Maryland 21202,
Attorneys for Petitioner.

The Daily Record Co., Baltimore, Md. 21202

## TABLE OF CONTENTS

## TABLE OF CITATIONS

### *Cases*







### *Statutes and Regulations*

IN THE

# Supreme Court of the United States

OCTOBER TERM 1977

## No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF OF PETITIONER

## OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is unpublished, but its issuance is reported at 556 F.2d 573 (4th Cir. 1977); the text of this opinion appears in the Appendix to the Petition for a Writ of Certiorari (APC 54a).[1] The order denying rehearing en banc, entered May 23, 1977, is unreported and appears in the Appendix to the Petition for a Writ of Certiorari (APC 55a). The opinion and order of the United States District Court for the District

[1] References to the Appendix to the Petition for a Writ of Certiorari are cited as "APC," and references to the Appendix herein as "A."

of Maryland was filed on July 13, 1976, in *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976) (APC 8a).

## JURISDICTION

The jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on April 28, 1977. Within the time prescribed by Rule 40 of the Federal Rules of Appellate Procedure, Petitioner filed a petition for rehearing and suggestion for rehearing en banc. That petition was denied by the court of appeals on May 23, 1977. A Petition for a Writ of Certiorari was filed within the 90 day period provided by 28 U.S.C. § 2101 and Rule 22 of this Court, and was granted on October 11, 1977.

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

### *Constitution of the United States*

**Amendment XIV, § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### *United States Code*

**Title 8, § 110(a)(15)(G)(i) and (iv)**

The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

* * *



(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669), accredited resident members of the staff of such representatives, and members of his or their immediate family.

* * *

(iv) officers, or employees of such international organizations, and the members of their immediate families.

**Title 8, § 1184(a)**

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248 [§ 1258 of this title], such alien will depart from the United States.

**Title 8, § 1202(c)**

(c) Every alien applying for a nonimmigrant visa and for alien registration shall make application therefor in such form and manner as shall be by regulations prescribed. In the application the alien shall state his full and true name, the date and place of birth, his nationality, the purpose and length of his intended stay in the United States; personal description (including height, complexion, color of hair and eyes, and marks of identification); his marital status; and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.

*Code of Federal Regulations*

**Title 8, § 214.1 Requirements for admission, extension, and maintenance of status.**

(a) *General.* Every nonimmigrant alien applicant for admission or extension of stay in the United States shall establish that he is admissible to the United States or that a ground of inadmissibility has been waived under section 212(d)(3) of the Act; present a passport upon admission and only when requested in connection with an extension of stay, valid for the period set forth in section 212(a)(26) of the Act, except as otherwise provided in this chapter, and, upon admission, a valid visa, except when either or both documents have been waived; agree that he will abide by all the terms and conditions of his admission or extension, and that he will depart at the expiration of the period of his admission or extension or on abandonment of his authorized nonimmigrant status; and post a bond on Form I-352 in the sum of not less than $500 if required by the district director, special inquiry officer, or the Board of Immigration Appeals at the time of admission or extension, to insure the maintenance of the alien's nonimmigrant status and his departure from the United States. A nonimmigrant whose visa has been automatically revalidated pursuant to 22 CFR 41.125(f) shall, if otherwise admissible, be readmitted for a period not to exceed the unexpired period of his initial admission or extension of stay which had been authorized by the Service prior to his departure to foreign contiguous territory or adjacent islands, as endorsed by the Service on the Form I-94 issued in connection with the returning nonimmigrant's prior admission or stay and presented by him, or as endorsed by the issuing school official or program sponsor on Form I-20 or DSP-66 presented by a returning nonimmigrant as defined in paragraph (F) or (J) of section 101(a)(15) of the Act. A nonimmigrant other than one in the classes defined in section 101(a)(15)(A) (i) or (ii) or (G) (i), (ii), (iii), or (iv) of the Act (members of which



classes are not required to obtain extensions of stay if they continue to be so recognized by the Secretary of State as members of such classes); section 101(a)(15)(B) who is visiting the United States temporarily for pleasure and section 101(a)(15) (C), (D), or (K) of the Act (members of which classes are ineligible for extensions of stay); or section 101(a)(15) (F) or (J) of the Act, and whose period of admission has not expired, shall apply on Form I-539 and may be granted or denied, without appeal, an extension of his period of temporary admission by an officer in charge of a suboffice or a district director. A separate application must be executed and submitted for each alien seeking an extension of temporary stay; however, regardless of whether they accompanied the applicant to the United States, the spouse and minor, unmarried children of any applicant who have the same nonimmigrant classification may be included in his application and may be granted the same extension without fee. If failure to file a timely application is found to be excusable, an extension may be granted from the time of expiration of authorized stay. When because of reasons beyond his control, or special circumstances, an alien needs an additional period of less than 30 days beyond his authorized stay within which to effect his departure, he may be granted such time without filing an application for extension. Extensions to members of a family group shall be for the same period; if one member is eligible for only a six-month extension and another for a twelve-month extension, the shorter period shall govern. For procedures relating to cancellation or breaching of bonds, see Part 103 of this chapter.

(b) *Termination of status.* Within the period of initial admission or extension of stay, the nonimmigrant status of an alien shall be terminated by the revocation of a waiver previously authorized in his behalf under section 212(d) (3) or (4) of the Act; or by the introduction of a private bill to confer permanent resident status on such alien.

(c) *Employment.* A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure, or section 101(a)(15)(C) of the Act as an alien in transit through this country, may not engage in any employment. Any other nonimmigrant in the United States may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the provisions of this chapter. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(9) of the Act.

## *University of Maryland Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes**

An initial determination of in-state status for admission, tuition, and charge-differential purposes will be made by the University at the time a student's application for admission is under consideration. The determination made at that time, and any determination made thereafter, shall prevail in each semester until the determination is successfully challenged prior to the last day available for registration for the forthcoming semester. A determination regarding in-state status may be changed for any subsequent semester if circumstances, as later defined, warrant redetermination.

In those instances where an entering class size is established and where an application deadline is stated, in-state conditions for admissions must be satisfied as of the announced closing application date.

* Draft of August 31, 1973 as amended on September 7, 1973. Approved by the Board of Regents on September 21, 1973 to become effective with any term of the University beginning on or after January 1, 1974.



*General Policy*

1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

   a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

   b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester.

   c. Where a student is the spouse or a dependent child of a full-time employee of the University.

   d. Where a student who is a member of the Armed Forces of the United States is stationed on active duty in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester, unless such student has been assigned for educational purposes to attend the University of Maryland.

   e. Where a student is a full-time employee of the University of Maryland.

2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge-differential purposes in all other cases.

3. Each campus of the University will be responsible for making the in-state determination for the prospective or enrolled student.

4. In-state status is lost at any time a financially independent student establishes a domicile outside the State of Maryland. If the parent(s) or other persons through whom the student has attained in-state status establishes a domicile in another state, the student shall be assessed out-of-state tuition and charges six months after the out-of-state move occurs.

5. The terms of this policy will not be applied retroactively.

*Definitions*

1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

2. A parent includes a natural parent, an adoptive parent, a legally-appointed guardian, and a person who stands *in loco parentis* to the student.

3. A spouse is a partner in a legally contracted marriage.

4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time.

5. The masculine gender of personal pronouns includes the feminine gender.

*Application*

1. A student requesting redetermination to in-state status who asserts that he is *financially dependent* upon a parent(s) or spouse domiciled in Maryland, as previously defined, will be required to produce by affidavit, in addition to other proof, documentation of the student's earnings for the



year immediately preceding the last day of registration for the semester for which the determination is requested. Such documentation shall include relevant income tax returns, statements from employers, and/or federal and state withholding forms. An affidavit showing all expenses of the student for the same period must also be submitted.

2. A student requesting redetermination to in-state status who asserts that he is *financially independent* will be required to present by affidavit documentation cited in paragraph 1.

3. In determining domicile, the University shall take into consideration, but shall not be limited to, the following criteria as they pertain to the individual case:

a. Own or rent and occupy real property in Maryland as one's domicile on a year-around basis.

b. Maintain a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintain within the State of Maryland all or substantially all personal possessions.

d. Pay Maryland income tax on all earned income including all taxable income earned outside the State.

e. Register all owned motor vehicles in Maryland.

f. Possess a valid Maryland driver's license, if licensed.

g. Register to vote in Maryland, if registered.

h. Give a Maryland home address on federal and state income tax forms.

*N.B.* The documentation offered in these instances may be required to be in affidavit form.

*Appeals*

A student who disagrees with his classification may request a personal interview with a campus

classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee (IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final.

*Implementation*

The implementation of this new policy to those eligible for redetermination will require an extended period of time. It is hoped that a decision in each case will be made within ninety (90) days of a request for redetermination. During this period of time, or any further period of time required by the University, fees and charges based on the previous determination must be paid. If the determination is changed, any excess fees and charges will be refunded.

---

NOTE: The deadline for meeting all requirements for an in-state status and for submitting all documents for reclassification is the last day of late registration for the semester the student wishes to be classified as an in-state student.

## QUESTION PRESENTED

Whether the decisions below erred in applying Supreme Court precedents on irrebuttable presumptions, disregarded the principles articulated in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and incorrectly concluded that the University of Maryland's policy of denying in-state status for tuition and fee purposes to nonimmigrants holding G-4 visas establishes an irrebuttable presumption violative of the due process clause of the fourteenth amendment to the United States Constitution?



## STATEMENT OF THE CASE

Following the decision of this Court in *Vlandis v. Kline*, 412 U.S. 441 (1973), the Board of Regents of the University of Maryland adopted a new policy for the classification of students as "in-state" or "out-of-state" for purposes of determining admission, tuition rates, and charge differentials. Like most other public institutions of higher education, the University of Maryland bases its award of in-state status on domicile.

Because it views nonimmigrant aliens as being under a legal disability which precludes the intent to be domiciled in Maryland, the University awards in-state status only to "United States citizens and . . . immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States." Even these individuals do not qualify automatically for the preferential, in-state tuition and charge differential rates.

The in-state policy describes eight non-exclusive indicia of domicile which are used to assist the University in determining a student's status.[2] (If the student himself is financially dependent on a parent, the University looks to the status of the parent rather than of the student in making the determination.) For students who are not United States citizens or permanent resident aliens (or are the dependent children of financially responsible parents holding similar nonimmigrant status), the University does not further examine other domiciliary factors because such individuals cannot have the requisite legal intent to establish Maryland domicile.[3] However, the University recog-

---

[2] Among the domiciliary indicia set out in the University's in-state policy are: presence, possession of personal and real property, motor vehicle registration, driver's license, voting, and income tax payments.

[3] The in-state policy defines domicile as follows:

> A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live

nizes that citizens and aliens who are lawfully admitted for permanent residence can establish domiciliary intent for in-state purposes.

Thus, permanent resident aliens can and do qualify for the preferential rates on the same bases as United States citizens. The in-state policy denies preferential rates to *both* citizens who are not Maryland domiciliaries *and* to nonimmigrants who, by definition, are not Maryland domiciliaries; it benefits citizens who are domiciled in Maryland, as well as aliens who are Maryland domiciliaries.

Even nonimmigrants are not permanently precluded by the University policy from qualifying for in-state status. A financially responsible parent who adjusts his status from nonimmigrant to that of permanent resident alien is no longer disabled from exhibiting the necessary domiciliary indicia. The same is true if a nonimmigrant student becomes financially independent and, like one of the Respondents (Juan Otero), adjusts his status to that of a permanent resident alien. Moreover, the University's three-step appellate process is available to such individuals both with respect to the effect of change in their immigration status and, subsequently, exhibition of domiciliary indicia.

On May 27, 1975, Respondents, undergraduate students at the University of Maryland, brought suit for declaratory and injunctive relief in the United States District Court for the District of Maryland against the University and its President, Dr. Wilson H. Elkins, alleging jurisdiction under 28 U.S.C. § 1343(3) and (4). These financially dependent students were nonimmigrant aliens who held G-4 visas,[4] as did their fathers,

permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time.

[4] A "G-4 alien" is one class of nonimmigrants; it consists of aliens who are "officers, or employees of . . . international



who were employed by certain international organizations based in Washington, D.C., *viz.*, the Inter-American Development Bank (IDB) and the International Bank for Reconstruction and Development (World Bank).[5] In particular, the students challenged as

organizations . . . and the members of their immediate families." 8 U.S.C. § 1101(a)(15)(G)(iv). A G-4 nonimmigrant is admitted to the United States "for such time and under such conditions as the Attorney General may by regulations prescribe." 8 U.S.C. § 1184(a).

Pursuant to the regulations for the admission of nonimmigrant aliens into the United States, a nonimmigrant such as the holder of a G-4 visa must agree "that he will abide by all the terms of and conditions of his admission or extension and that he will depart at the expiration of the period of his admission or extension or on abandonment of his authorized nonimmigrant status." 8 C.F.R. § 214.1. In addition, an alien applying for a nonimmigrant visa must state under oath on his application "the purpose and length of his intended stay in the United States." 8 U.S.C. § 1202(c).

Thus, entitlement to G-4 nonimmigrant status by a person and his family is derived from the circumstances of that alien's employment with an international organization, and such status with its attendant permission to remain in the United States terminates at any time that the employment with an international organization ceases.

Under federal law, employees of the IDB and the World Bank who hold G-4 visas are the beneficiaries of various privileges and immunities, including exemption from federal and state income tax levies. Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 502; Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; 22 U.S.C. § 288(d); 26 U.S.C. § 893(a).

[5] Respondents Moreno and Otero are natives of Western Hemisphere countries, Paraguay and Bolivia, respectively (APC 12a-13a); Hogg is a native of an Eastern Hemisphere country, the United Kingdom (APC 15a). The former are children of IDB employees and the latter of a World Bank employee (APC 12a-15a). Amounts spent by their parents for their support were $3,000, plus tuition paid to the University, for Moreno (1974), Ex. 1, Att. 1 to Plaintiffs' Complaint, p. 8 (R. 23) and $6,000 for Hogg (1974), Ex. 3, Att. 1 to Plaintiffs' Complaint, p. 4 (R. 95), specific amounts not being alleged in the case of Otero. Ex. 2, Att. 1 to Plaintiffs' Complaint, pp.5-

violative of the due process and equal protection clauses of the fourteenth amendment to the United States Constitution the University's policy of denying in-state

6(R. 61-62). Wages earned by the students range from $567 for Moreno (1974), Ex. 1, Att. 1 to Plaintiffs' Complaint, p. 9 (R. 24) to $2,479 for Otero (1973). Ex. 2, Att. 1 to Plaintiffs' Complaint, p. 17 (R. 73).

Their fathers hold lucrative and responsible positions with their respective employers. Manuel Moreno has been employed by the IDB since 1960 and is a "member of the professional staff" of the Bank. Ex. 1 Att. 1 to Plaintiffs' Complaint, p. 18 (R. 33). Rene Otero has also worked for the IDB since 1960 and is assigned to the Bank's legal department. Ex. 2 Att. 1 to Plaintiffs' Complaint, p. 9 (R. 65). In 1974, Mr. Moreno received a salary of $26,380 plus a $2,550 dependency allowance. Ex. 1 Att. 1 to Plaintiff's Complaint, p. 18) (R. 33). The IDB pays a dependency allowance to employees of $675 annually for a spouse whose own annual income is less than $10,000 and $400 annually per child (A. 25a-27a).

World Bank allowances to employees are even greater. Senate Report No. 94-1009, Foreign Assistance and Related Program Appropriation Bill, 1977 (94th Congress, 2d Session) at 104-05. In addition, the World Bank by way of a "tuition equalization subsidy" reimburses staff members for the difference between in-state and out-of-state tuition charged by the University of Maryland (A. 40a-42a)

None of the fathers pay income tax on compensation received from their respective international organization employers. Throughout the in-state determination appeals process and this litigation, the students were represented by counsel retained by their respective international organizations. (Brief of Appellees at 17, Moreno v. University of Maryland, 556 F.2d 573 (4th Cir. 1977)).

These compensation and fringe benefit policies of the IDB and World Bank have met with sharp criticism. As one congressional committee has noted

> [O]ur investigations have led us to the distressing conclusion that, rather than the rewards of a career of service, there is found in the banks a broad pattern of personal enrichment. The personnel management practices of the bank are suggestive of an institutionalized granting of lifetime sinecures where extraordinarily high salaries are commonplace and the pursuit of fringe benefits has been raised to a form of art.

Senate Report No. 94-1009, *supra* at 102.



status for tuition and charge differential purposes to holders of G-4 visas or those who are financially dependent on persons holding such nonimmigrant status.

After a hearing on April 9, 1976, the district court, on July 13, 1976, filed an opinion (APC 8a) holding that the University's in-state policy as applied to G-4 aliens created an impermissible irrebuttable presumption in violation of the due process clause of the fourteenth amendment. The court said that by the use of a presumption of nondomicile for G-4 aliens, the University denied Respondents the opportunity to demonstrate that they were entitled to in-state status for purposes of tuition and charge differentials.

Relying on *Vlandis v. Kline, supra, Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the court held that this irrebuttable presumption of nondomicile could not be justified on the basis of cost equalization or administrative convenience because it was not (according to the court) universally true and because the University had a reasonable alternative means of making a domicile determination for holders of G-4 visas (*viz.*, the application of the eight non-exclusive indicia of domicile). Ignored by the court was any discussion of or reference to *Weinberger v. Salfi*, 422 U.S. 749 (1975),[6] nor did the court attempt to apply the principles of *Salfi* or to distinguish the present case from *Vlandis*. Because the district court decided the case on due process grounds, it did not rule on the students' equal protection claim.

The court enjoined the University's President (the University itself was dismissed as a party) from denying Respondents and members of their class in-

[6] Neither party called the case to the attention of the district court.

state status "solely because they or their parents" hold G-4 visas[7] (APC 51a).

On July 31, 1976, an appeal was noted. Before the court of appeals, Petitioner contended that the principles of *Salfi* and subsequent "irrebuttable presumption" decisions of this Court warranted reversal. Nevertheless, in a per curiam opinion, dated April 28, 1977, the court of appeals affirmed the district court, eschewed any discussion of or reference to *Salfi* and its progeny, and in effect adopted the opinion of the district court (APC 54a). A timely petition for rehearing by the full court was filed, and denied on May 23, 1977 (APC 55a). On May 26, 1977, upon Petitioner's motion, the Fourth Circuit stayed its mandate pending application to this Court for a writ of certiorari (APC 56a).

A timely Petition for a Writ of Certiorari was filed with this Court on July 28, 1977, and granted on October 11, 1977.

## SUMMARY OF ARGUMENT

Relying upon *Vlandis v. Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) and *Stanley v. Illinois*, 405 U.S. 645 (1972), the lower courts erroneously concluded that the University of Maryland's in-state policy for admission, tuition, and charge differentials creates an unconstitutional irrebuttable presumption of non-domicile for nonimmigrants.

### EFFECT OF *SALFI*

Under *Weinberger v. Salfi*, 422 U.S. 749 (1975), state classifications not affecting fundamental liberties do not create unconstitutional irrebuttable presumptions or violate due process if rationally related to a legitimate governmental objective. Basic human liber-

[7] On August 3, 1976, in response to Petitioner's motion, the district court stayed those portions of its final order which granted declaratory and injunctive relief (APC 52a).



ties and fundamental constitutional rights are not at stake in this case. *Compare San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), *with Cleveland Board of Education v. LaFleur, supra*, and *Stanley v. Illinois, supra*.

### INAPPLICABILITY OF *VLANDIS*

*Vlandis v. Kline, supra*, does not invalidate irrebuttable presumptions which are not "permanent" in nature. Here, if the parents of Respondents alter their immigration status to permanent resident alien or if the students similarly alter their status and become financially independent while students, they will be entitled to qualify for in-state status on the same bases as Maryland domiciliaries. *See Starns v. Malkerson*, 401 U.S. 985 (1971).

### STATE INTERESTS

The challenged feature of the University's in-state policy bears a rational relationship to the University's purpose of limiting its expenditures, achieving cost equalization, efficiently administering the in-state determination and appeals process, and preventing disparate treatment among categories of nonimmigrants with respect to tuition and fee differentials. *Knebel v. Hein*, 429 U.S. 288 (1977); *Weinberger v. Salfi, supra; Mathews v. Diaz*, 426 U.S. 67 (1976); *Starns v. Malkerson, supra*. The policy does not create a classification on the basis of alienage, because it is predicated upon domicile and therefore disadvantages a class which includes some United States citizens as well as some aliens. *Compare Nyquist v. Mauclet*, ___ U.S. ___, 53 L. Ed. 2d 63 (1977).

### TRUTH OF PRESUMPTION

Even if *Vlandis v. Kline, supra*, is held to apply to this case, the premise of the University's in-state policy, *viz.*, that nonimmigrant aliens cannot acquire Mary-

land domicile, is universally true. Federal law and the Maryland law of domicile preclude nonimmigrant aliens and G-4's in particular from establishing domicile in the United States. 8 U.S.C. § 1101(a)(15)(G)(iv), § 1184(a) & § 1202(c); 8 C.F.R. § 214.1; *Nyquist v. Mauclet, supra; Brafman v. Brafman,* 144 Md. 413, 125 A. 161 (1924).

### *VLANDIS* SHOULD BE OVERRULED

Post-*Vlandis* decisions of this Court have so eroded the theory and application of that case as to warrant its overruling. *Weinberger v. Salfi, supra; Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976); *Murgia v. Massachusetts Board of Retirement,* 427 U.S. 307 (1976); *Knebel v. Hein, supra; Skafte v. Rorex,* 430 U.S. 961 (1977); *Fiallo v. Bell,* 430 U.S. 787 (1977).

## ARGUMENT

### I.

### UNDER THE PRINCIPLES SET FORTH IN *WEINBERGER v. SALFI,* 422 U.S. 749 (1975), AND ITS PROGENY, THE UNIVERSITY'S IN-STATE POLICY DOES NOT ESTABLISH AN IRREBUTTABLE PRESUMPTION IN VIOLATION OF DUE PROCESS.

The principal issue in this case is whether the irrebuttable presumption doctrine of *Vlandis v. Kline,* 412 U.S. 441 (1973), which has been severely limited if not overruled by *Weinberger v. Salfi,* 422 U.S. 749 (1975), and subsequent decisions, must be applied to the classification at stake here.

The decisions below hold that every irrebuttable presumption not universally true in fact is unconstitutional (APC 41a). Applying this now discredited principle, *see Weinberger v. Salfi, supra* at 781 (1975); *The Supreme Court, 1974 Term,* 89 Harv. L. Rev. 47, 78 (1975), the district court opinion adopted by the court of appeals concluded that neither the Maryland law of domicile nor United States immigration law precluded a



G-4 alien from acquiring a state domicile. Hence, according to its reasoning, the University, although perhaps correct in its interpretation of the law of domicile with respect to other categories of nonimmigrants, had adopted a not universally true or invalid measure of domicile with respect to G-4's. In arriving at this conclusion, the opinion relied on three cases to support its view that the application of the University's in-state policy to G-4 aliens created an unconstitutional irrebuttable presumption, the first and foremost being *Vlandis v. Kline, supra.*

In *Vlandis,* a deeply split decision, this Court held that a "permanent" irrebuttable presumption of nonresidence was created by a Connecticut statute which provided that an out-of-state applicant for admission to a public college could not adjust to in-state status for the entire period of his attendance at the school, when that presumption was not universally true in fact. 412 U.S. at 443, 452. However, the majority opinion upheld the power of the State to charge nonresidents higher tuition and carefully distinguished two prior cases relating to in-state/out-of-state tuition differentials.

The first, *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd,* 401 U.S. 985 (1971), upheld Minnesota's requirement that no student is eligible for in-state status for tuition purposes unless he has been a bona fide domiciliary of the state for at least one year. The second case, *Kirk v. Board of Regents of University of California,* 78 Cal. Rptr. 260 (1969), *appeal dismissed,* 396 U.S. 554 (1970), upheld a similar one-year residency requirement for in-state status. The Court noted that under these schemes the student could rebut the presumption of nonresidency after having lived in the state one year by presenting other sufficient evidence to

show bona fide domicile within the state. 412 U.S. at 452. The Court added that:

> By contrast, the Connecticut statute prevents a student who applied to the University from out of State, or within a year of living out of State, from *ever* rebutting the presumption of nonresidence during the *entire time* that he remains a student, no matter how long he has been a bona fide resident of the State for other purposes.

*Id.* (emphasis added).

Finally, after rejecting two of Connecticut's proffered justifications for the statutory scheme (*viz.*, cost equalization, preference for established residents), the majority, in language usually associated with the standard of "strict scrutiny" in equal protection cases, *see Dunn v. Blumstein*, 405 U.S. 330 (1972), said that the State's interest in administrative efficiency and certainty could not save the conclusive presumption "where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised." 412 U.S. at 451. The Court identified that reasonable alternative as a system permitting an out-of-state student the opportunity to offer evidence of indicia of domiciliary intent. *Id.* at 454.

The lower courts in the present case also relied on two other decisions of this Court to strike down the in-state policy of the University of Maryland, *viz.*, *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). In *Stanley*, this Court struck down an administrative presumption that an unwed father was unfit to have custody of his children, and in *LaFleur* it held that a Board of Education rule presuming maternal incapacity for a set period during pregnancy and after childbirth created an unconstitutionally impermissible irrebuttable presumption.



Just as many lower courts did up to 1975,[8] the lower courts in the instant case read these three cases to stand for the proposition that any legislative or administrative classification that could be stated in the form of a presumption was unconstitutional if the presumption was not universally or necessarily true. Under such a rule, the lower courts felt under no constraint to limit *Vlandis* to its facts, to recognize that the presumption at issue in this case was not "permanent" like the one condemned in *Vlandis*, or to distinguish *LaFleur* or *Stanley* as involving classifications affecting fundamental rights.

Even at its zenith the irrebuttable presumption doctrine was never able to command more than a fragile majority of this Court's justices and met with the near universal condemnation of commentators[9] who contended that the doctrine was merely an excuse to apply "strict scrutiny" equal protection analysis.

Finally, in 1975, in *Weinberger v. Salfi*, *supra*, this Court sharply and properly curtailed the application of the irrebuttable presumption doctrine. *Salfi* involved a challenge to a Social Security Act provision which limited eligibility for survivors' benefits to persons whose relationship with the insured began at least nine months before his death. The plaintiffs contended that the nine-month duration-of-relationship requirement created an impermissible irrebuttable presumption that short-lived marriages were a sham aimed at obtaining benefits and that the plaintiffs should be given an

[8] *See, e.g.*, Salfi v. Weinberger, 373 F. Supp. 961, 965 (N.D. Cal. 1974), *rev'd*, 422 U.S. 749 (1975); Hein v. Burns, 402 F. Supp. 398 (S.D. Iowa 1975), *rev'd*, 429 U.S. 288 (1977).

[9] Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

opportunity to demonstrate the bona fide nature of their relationship with the insured. The trial court, like the lower court in the present case, felt it was unnecessary to demonstrate how *Vlandis, LaFleur,* and *Stanley* applied to the challenged statute. Instead, the district court in *Salfi* merely asserted that these decisions mandated the invalidation of every legislative presumption that was not universally or necessarily true in fact. *Salfi v. Weinberger, supra;* 89 Harv. L. Rev. at 78 n.16.

However, on appeal, this Court rejected such a superficial analysis. *Stanley* and *LaFleur* were distinguished on the grounds that they involved *basic* civil rights and due process liberties, such as the right to raise one's children and the right to personal choice in matters of marriage and family life. 422 U.S. 771.[10] Rather than relying on anything said in *Vlandis*, the Court based its decision on *Starns*:

> As in *Starns v. Malkerson*, . . . the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns*, appellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.

[10] In Turner v. Department of Employment Security, 423 U.S. 44, 181 (1975), a case decided after *Salfi*, this Court in a per curiam opinion struck down a Utah law creating a presumption of maternal incapacity "virtually identical to the presumption found unconstitutional" in *LaFleur*. However, the Court was careful to adopt the limitations on the irrebuttable presumption doctrine set out in *Salfi*. ("The Fourteenth Amendment requires that . . . [states] must achieve legitimate state ends through more individualized means *when basic human liberties are at stake.*") *Id.* at 46 (emphasis added).



*Id.* at 772 (citation omitted).

Absent in *Salfi* was any of the language of "strict scrutiny" or "least restrictive alternative"; instead, this Court emphasized the "minimum rationality" equal-protection standard applicable in social welfare cases. *See Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Unlike *Vlandis*, *Salfi* demonstrated deference to a proffered administrative convenience justification for the statutory scheme:

> There is . . . no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

422 U.S. at 785.

Most significantly, the fact that the "presumption" at issue was not universally true did not aid the plaintiffs' case:

> [U]ndoubtedly [the statute] excludes some surviving wives who married with no anticipation of shortly becoming widows, and it may be that appellee Salfi is among them. . . .
>
> While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham arrangements, we think it clear that Congress could rationally choose to adopt such a course.

*Id.* at 781.

Finally, sounding the death knell for any expansion of the irrebuttable presumption doctrine, this Court said:

> We think that the District Court's extension of the holdings of Stanley, Vlandis and LaFleur to

> the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.

*Id.* at 772.

And *Salfi* was just the beginning of what is now a long line of this Court's cases that refuse to apply *Vlandis* and its progeny or which reverse decisions that applied the doctrine in the fashion of the district court opinion adopted by the Fourth Circuit here.

In *Murgia v. Massachusetts Board of Retirement*, 427 U.S. 307 (1976), this Court reversed a three-judge district court decision that invalidated a statute providing for the mandatory retirement of State police officers at 50 years of age. The age classification had been challenged below on both due process and equal protection grounds and the lower court had relied on *LaFleur* to strike down the statute. Yet this Court eschewed any discussion of irrebuttable presumptions and upheld the statute applying traditional "rational basis" equal protection analysis.[11]

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court overturned the decision of a three-judge federal court that *Vlandis* and *Stanley* mandated the unconstitutionality of a statutory irrebuttable presumption of total disability for miners due to black lung disease based on clinical evidence of a complicated stage of the disease. In so doing, the Court relied on *Salfi* and noted that the mere fact that the statute was phrased in terms of an irrebuttable presumption would not invalidate the statute "when its operation and effect are completely permissible." *Id.* at 24.

[11] In Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), both the opinion of the court and the dissenting opinion noted that the *Murgia* decision cast a cloud on the continued vitality of the irrebuttable presumption doctrine.



In *Knebel v. Hein*, 429 U.S. 288, (1977), the Court overturned a three-judge court's determination that a federal food stamp regulation disallowing a deduction for transportation expenses in connection with job training for purposes of computing a recipient's income was unconstitutional as violative of the irrebuttable presumption doctrine. Although the Court noted that "the District Court was correct that the regulations operate somewhat unfairly in appellee's case," it stated that they did not embody an irrebuttable presumption. *Id.* at 297.

In *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of substantial federal question*, 430 U.S. 961 (1977), the Court summarily disposed of a resident's alien's contention that a state ban against voting by aliens created an irrebuttable presumption.

And in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court rejected an irrebuttable presumption challenge to a federal statute that denied preferential immigration status to unwed fathers and their illegitimate offspring despite the obvious fact that the challenged classification, like those at issue in *Stanley* and *LaFleur*, affected fundamental freedoms of choice in matters of marriage and family life.[12] This wealth of authority points to only one conclusion, that the lower courts in this case

[12] Other circuit courts of appeals were quick to perceive that the irrebuttable presumption doctrine was on the descendancy.

In Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), the Tenth Circuit, in reliance upon *Salfi*, held that in a case challenging a residency requirement for teachers:

> [W]e do not feel the conclusive presumption doctrine was intended to apply. The Supreme Court has disapproved extention of the doctrine which would make it destructive of numerous legislative judgments drawing lines.

540 F.2d at 485.

In Sellers v. Ciccone, 530 F.2d 199 (8th Cir. 1976), the Eighth Circuit upheld the exclusion of long-term inmates

have fundamentally misapplied what little, if anything, that may be left of the irrebuttable presumption doctrine.[13]

Contrary to the holding of the lower courts, *LaFleur* and *Stanley* have no application here. Basic human liberties and fundamental constitutional rights are not at stake in this case. Public education is not a right secured by the United States Constitution. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973); *Starns v. Malkerson, supra; Kirk v. Board of Regents of the University of California, supra.* And state regulation of entitlement to limited education benefits falls in the category of the social welfare legislation reviewed in *Salfi.*[14]

---

from prison training programs, primarily on the basis of *Salfi.* 530 F.2d at 202.

And in Fisher v. Secretary of HEW, 522 F.2d 493 (7th Cir. 1975), the Seventh Circuit upheld the validity of Social Security Act presumptions with respect to coverage of domestic servants, stating:

> As noted by Mr. Justice Rehnquist in his dissent in *LaFleur,* almost any law could be in some sense characterized as an irrebuttable presumption. In the normal case, well established standards of equal protection and due process should be applied to determine the validity of a Congressional enactment. It is only an unusual case where a statute will be declared invalid because of an improper irrebuttable presumption, and the same result would not be reached applying normal equal protection and due process standards.

*Id.* at 504.

[13] This Court may very well conclude that under *Salfi* and its progeny the irrebuttable presumption doctrine no longer has any force except, perhaps, where a classification affecting fundamental constitutional rights is involved. Petitioner respectfully submits, however, that the better course, for the guidance of the lower federal judiciary, would be to overrule the doctrine and to require traditional equal protection analysis of state classifications.

[14] Moreover, Respondents have not demonstrated "property" or "liberty" interests necessary to invoke the guarantee



The classification at issue in this case, even assuming it is regarded as a presumption, does not fall within the prohibitions of *Vlandis*. First, the presumption is not permanent.

Unlike the students in *Vlandis* who could never qualify for in-state status, Respondents in this case do have the opportunity to qualify. If their parents alter their status to that of a permanent resident alien *or* if the students similarly alter their status and become financially independent, Respondents will be able to qualify for in-state status on the same basis as all other persons who may be domiciled in Maryland.

Unlike *Vlandis*, this case does not involve what was viewed as "a bizarre pattern of discrimination." *Vlandis v. Kline, supra* at 459 (White, J., concurring). The line drawn by the University of Maryland is one this Court has sustained. *Mathews v. Diaz,* 426 U.S. 67 (1976). *See Nyquist v. Mauclet,* ___ U.S. ___, 53 L. Ed. 2d 63 (1977). Like the plaintiffs in *Starns,* who after one year of disability could present evidence of domiciliary intent, the students in this case, after they or their parents alter their immigration status to that of permanent resident alien, can present evidence of domiciliary intent necessary to qualify for in-state status.[15]

---

of due process. Property interests are created and their dimensions defined by reference to state law. Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). The University's in-state policy, promulgated pursuant to the institution's broad statutory powers, *see* MD. ANN. CODE art. 77A, § 15 (1975), expressly does not provide nonimmigrants with the tuition subsidy accorded Maryland domiciliaries. In addition, as this Court observed in Memorial Hospital v. Maricopa County, 415 U.S. 250, 260 n.15 (1974), charging higher tuition fees to nonresident students cannot be equated with the denial of basic subsistence often held to call into play a "liberty" interest. *See also* Starns v. Malkerson, *supra;* Kirk v. Board of Regents, *supra.*

[15] It is not an unreasonable burden to require students or their parents to adjust their immigrant status before the

Nor can it be said that the University's in-state policy speaks in terms of domicile but signifies otherwise in the case on nonimmigrants — no more than Minnesota's policy in *Starns* of establishing a one-year restriction on demonstrating domicile can be said to be an unconstitutional "invalid measure of domicile" because a respectable body of law holds that physical presence for a moment in a particular place may be enough to establish domicile. *See White v. Tennant,* 31 W. Va. 790, 8 S.E. 596 (1888); *Winans v. Winans,* 205 Mass. 388, 91 N.E. 394 (1910); M. Jacobs, *Law of Domicile* § 134 (1887). However, even if Respondents in this case may in fact be Maryland domiciliaries, like the out-of-state students in *Starns* who may have been domiciliaries before the lapse of one year or the widow in *Salfi* who may have entered into a bona fide marriage without regard to obtaining Social Security benefits, it is clear that *Salfi* does not require that the allegedly presumed fact be true in every case.What *Salfi* does require is that the state classification be rationally related to a legitimate objective. 422 U.S. at 772.

---

University will further consider proffered evidence of domiciliary intent. First, whatever burdens may exist in this regard are created by the immigration laws and not the University. Cf. Fiallo v. Levy, 406 F. Supp. 162 (E.D.N.Y. 1975), *aff'd,* 430 U.S. 787 (1977). Second, as Respondents freely conceded below, 4th Cir. Brief of Appellees at 41, a G-4 in order to stay in this country will have to adjust his status to permanent resident alien. And in fact Respondent Otero and a daughter of Vincent Hogg (father of Respondent Hogg) have so adjusted their status. Moreover, both Eastern Hemisphere aliens like the Hoggs and Western Hemisphere aliens like the Morenos and the Oteros can adjust their status without leaving the country, 8 U.S.C. § 1255, and President Carter has recently ordered a speedup in the processing of applications for permanent residency. Undocumented Aliens — Fact Sheet, Office of the White House Press Secretary, 13 WEEKLY COMP. OF PRES. DOC. 1169 (Aug. 8, 1977). In addition, if as Respondents contended below, most G-4 parents who eventually become permanent residents do so as parents of children who become citizens or permanent residents, such parents need not obtain the labor certification sometimes required by 8 U.S.C. § 1182.



The interests asserted by Petitioner in support of the challenged in-state policy are entirely sufficient in light of the mere rational basis required by *Salfi.*

In *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 605-06 (1976), this Court noted:

> We do not suggest . . . that a State, Territory, or local government, or certainly the Federal Government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens.

The line drawn by the University between permanent resident aliens and nonimmigrants is identical to that sustained by this Court in *Mathews v. Diaz, supra.* In *Diaz,* the Court upheld a scheme which *denied* Medicare benefits to nonimmigramts, but offered them to citizens and permanent resident aliens (the very same classification as in the instant case) on the rational basis that the amount of Medicare benefits was not limitless and that Congress could draw the line at citizens and permanent resident aliens because as a class they could be expected to have a greater affinity to the United States. Lest this case be distinguished as one involving the federal government's plenary control over aliens, the Court in *Diaz* noted that the only reason state exclusion of some aliens from benefits could not be justified is because the states invariably treated out-of-staters and aliens differently. Such a defect is not present in the University's in-state policy. Both out-of-staters and nonimmigrants are denied in-state status.

For these same reasons, *Nyquist v. Mauclet, supra,* is inapplicable. There, a five-Justice majority of this Court applied a strict scrutiny equal protection analysis to strike down a state educational benefits scheme which *denied* assistance to permanent resident aliens. In so

doing, the majority of the Court noted that the statute was "directed at aliens and . . . only aliens are harmed by it." 53 L. Ed. 2d at 70. On the contrary, the University's in-state policy *benefits* the precise class disadvantaged in *Mauclet* and is directed at and disadvantages only nondomiciliaries, a class which includes some United States citizens as well as some aliens.

Moreover, as *Mauclet* suggests at the very least, *id.* at 68, and as Respondents conceded below, 4th Cir. Brief of Appellees at 52, the classification created by the University is correct in its premise that most nonimmigrants are precluded from establishing domicile.[16] As one perceptive legal scholar has noted, because nonimmigrants cannot acquire domicile like permanent resident aliens, a state should have greater latitude in affecting the rights of the former group:

> Resident aliens are on a citizenship track — after five years they are eligible for naturalization. Their right to remain in the United States does not depend, however, on their obtaining citizenship. They serve in the armed forces and were subject to conscription under the selective service laws. They pay taxes precisely like citizens of the United States. They enjoy no immunity from state or federal criminal law. Resident aliens enter the United States with the intention of making this country their home, and it appears that the great majority of them remain here indefinitely. Nonresident aliens, by contrast, are admitted to the United States for strictly limited periods of time that are determined before they enter the United States. Included in the category of nonresident aliens are officials of foreign governments, temporary visitors for business or pleasure, foreign students, temporary workers and trainees, foreign journalists, and

[16] As Petitioner urges below in Part II of this Argument, this premise is universally true for all classes of nonimmigrants.



> many others who are neither expected nor permitted to remain in this country indefinitely.

G. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 Mich. L. Rev. 1092, 1110-11 (1977)[17]

The limitation of governmental expenditures to those with a greater affinity, a theory which supported the classifications at issue in *Diaz, Starns,* and *Kirk,* was the primary rationale proffered by the University in support of its in-state policy. In *Diaz,* this Court noted the reasonableness of the presumption said to be at issue here, the difficulty of line-drawing for purposes of entitlement to government benefits, and the obvious fact that "some persons who have an almost equally strong claim to favored treatment" are placed on different sides of the line. 426 U.S. at 83. Citing *Salfi* and *Dandridge v. Williams, supra,* this Court said, "When this kind of policy choice must be made, we are especially reluctant to question the exercise of Congressional judgment." 426 U.S. at 84. It is this kind of rational judgment which the lower courts struck down in the present case.

The University's requirement that nonresidents and nonimmigrants pay out-of-state rates bears a rational relationship to the State's purpose of financing, operating, and maintaining the University of Maryland. In addition, the University's in-state policy is a rational attempt to achieve cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, *viz.,* nonimmigrants and other nonresidents. *See Starns v. Marker-*

[17] Professor Rosberg has noted that the number of nonimmigrants admitted for temporary periods each year exceeds 3 million while only 400,000 permanent resident aliens are admitted annually. G. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 MICH. L. REV. 1092, 1110 (1977).

*son, supra.* This economic argument takes on greater force in light of the fact that Respondents seek to carve out an exception in Maryland's even-handed administration of its in-state policy for a privileged class not subject to the full range of Maryland taxes.

Another sufficient interest recognized in *Salfi,* which justifies Maryland's treatment of nonimmigrant aliens, is the administrative difficulties presented by individualized hearings for the University's large nonimmigrant student population. At the College Park undergraduate campus of the University of Maryland, 14 staff members devote on the average a third of their time administering the in-state determination and appeal process at a cost of more than $60,000 annually. In 1975 alone, 875 petitions for in-state classification were filed. How much larger that figure would have been if individualized hearings on additional *domiciliary indicia* were given to nonimmigrants is a matter of speculation.[18] But the University's policy of limiting in-state classification hearings for nonimmigrants to the "objective criterion" of *changes in their immigration status* reduces the need for and burden and expense of long, complicated hearings (many of which may require interpreters) with respect to other *domiciliary indicia. Weinberger v. Salfi, supra* at 772. The University's policy promotes efficiency and reduces costs, so that funds might be better spent on educational needs, by requiring full-blown hearings on domiciliary indicia only when a G-4 alien or other nonimmigrant student has adjusted his immigration status.

Finally, Respondents' constitutional claims are in essence a demand for preferential treatment. In arguing below that federal law does not preclude G-4 visa holders from establishing domicile, they contend that unlike those immigrants specifically required to main-

[18] As of the fall of 1975, more than 550 nonimmigrants were registered at the University of Maryland.



tain an overseas domicile and those whom they say may enter the United States "for only a specific temporary purpose," G-4's and a few other immigrant categories are specially exempted by Congress from such a burden. 4th Cir. Brief of Appellees at 51-52. Thus, they in effect ask the University to administer its in-state policy by adopting such proffered distinctions, so as to favor a limited (and generally alluent see *supra* at 13-14 n.5) category of nonimmigrants and to deny benefits to other categories of nonimmigrants with generally more meager resources. The prevention of such disparate treatment is an additional reason for upholding the University's in-state policy. *See Knebel v. Hein, supra.*

In summary, Petitioner contends that the decisions below improperly permitted the irrebuttable presumption doctrine to become an "engine of destruction" for a rationally based classification, *Weinberger v. Salfi, supra* at 772, that the lower courts should never have required the challenged feature of the University's in-state policy to be "universally true in fact," and that its in-state policy comports with the requirements of due process if they have any application to this case.

## II.

**EVEN IF *VLANDIS* IS APPLICABLE AND IS HELD TO REQUIRE AN IRREBUTTABLE PRESUMPTION BE UNIVERSALLY TRUE, THE PRESUMPTION OF NONDOMICILE FOR NONIMMIGRANTS IS TRUE IN ALL CASES.**

Petitioner has argued that the University is not constitutionally required to have an in-state policy universally true in its premise that nonimmigrants are disabled from establishing Maryland domicile as long as that presumption is rationally based. The University also contends that even in the event its policy is found under *Vlandis* to create a *permanent* irrebuttable presumption with respect to the domicile of holders of

G-4 visas, the student Respondents (or their financially responsible parents) lack the capacity to become Maryland domiciliaries and thus whatever presumption may exist is in fact universally true.

The University's in-state policy tracks the State's law of domicile to classify nonimmigrant aliens as nondomiciliaries. Under Maryland law domicile is defined as the "place where a man has his true, fixed, permanent home," *Shenton v. Abbott,* 178 Md. 526, 15 A.2d 906, 908 (1940), and as "residence at a particular place accompanied by positive or presumptive proof of the intention to remain there for an unlimited time." *Brafman v. Brafman,* 144 Md. 413, 414, 125 A. 161 (1924).[19] This definition by its terms would seem to preclude those who are not permanent resident aliens from acquiring domicile. Finally, it should be noted that in the context of entitlement to state benefits, the Maryland Court of Appeals has been very strict in the application of its law of domicile. *See, e.g., Walsh, Adm'r v. Crouse,* 232 Md. 386, 194 A.2d 107 (1963); *Maddy v. Jones,* 230 Md. 172, 126 A.2d 482 (1962).

Nonimmigrant aliens, and G-4 visa holders in particular, cannot establish the requisite intent necessary to create a Maryland domicile for in-state tuition purposes because of the terms and conditions upon which they continue to reside in this country. A G-4 visa is granted for the sole purpose of entry and residence during employment. An alien applying for a nonimmigrant visa must state under oath the "length of his intended stay in the United States." 8 U.S.C. § 1202(c). Thus, unless he adjusts his status to that of permanent resident alien, a G-4 can remain in this country only for a period of finite and limited duration.

[19] In addition, under Maryland law an individual must have the legal capacity to change his domicile. Liberty Mut. Ins. Co. v. Craddock, 26 Md. App. 296, 303, 338 A.2d 363 (1975).



The alien must leave upon termination of employment. 8 CFR § 214.1. And he represents an intent to do so when applying for the visa. The acquisition of Maryland domicile requires an intent to establish a home within the State without any present intention of removing therefrom. Thus, it would appear impossible as a matter of law for a person who has implicitly and continuously maintained that he intends to leave this country upon termination of employment (or other specific event such as in the case of foreign students on F-1 visas, the completion of their studies) to establish a Maryland domicile. Furthermore, absent an attempt to change from nonimmigrant to immigrant status, such a party should be estopped from asserting that despite his original pretentions, and despite the terms of his visa, he really intends to permanently reside in this country.

Rather than relying on any principle of the Maryland law of domicile, the lower court fashioned Maryland's law from a District of Columbia case declaring a G-4 to be a domiciliary for the purpose of access to the courts. *Alves v. Alves,* 362 A.2d 111 (D.C. 1970).[20] A fundamental error in the lower courts' analysis is its notion of domicile as a fixed, unalterable concept. However, domicile does not bear a fixed meaning and composition for all applications, and a determination that a nonimmigrant alien is domiciled in a place for one purpose does not necessitate that he is domiciled there for another. For example, Connecticut permits a nonresident alien to sue in its courts. *Santangelo v. Santangelo,* 137 Conn. 404, 78 A.2d 245, 247 (1951) ("An alien stands on the same footing as a non-resident. Our public policy, as reflected in our constitution, is that our

[20] Petitioner urged both the district court and the court of appeals to defer to Maryland courts the question of whether the state law precluded G-4's from establishing Maryland domicile, but the lower courts refused to abstain or certify the question to the Court of Appeals of Maryland. *See, e.g.,* Answer to Complaint (R. 116 *et seq.).*

courts should be open to 'every person.'")[21] Yet the University of Connecticut like practically every other state university requires a nonimmigrant alien student to become a permanent resident alien before he can qualify for in-state status.

Another illustration is *Hayes v. Board of Regents of Kentucky State University*, 362 F. Supp. 1173 (E.D. Ky. 1973), where a student, previously judged to be a Kentucky domiciliary by voting authorities, challenged a determination by the university that he was a nondomiciliary for tuitional purposes. The plaintiff contended that a decision by the former was binding upon the latter. There the court noted:

> This proposition is tenable only if 'domicile' bears a fixed meaning and composition for all applications. If the scope of this term varies according to the purpose served, Kentucky State University is obviously not bound by the identification of 'domicile' made by other agencies.

362 F. Supp. at 1173.

The court found that:

> [D]omicile is not susceptible to a rigid and arbitrary definition. The term will display varying hues as its application shifts. Consequently, there is no reason to presume that a determination of domicile by voting authorities has binding effect upon college officials.

*Id.* at 1175. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, Comment o (1971); Note, *Does Domicile Bear a Single Meaning?*, 55 Colum. L. Rev. 589 (1955).

The truth of the premise underlying the University's in-state policy is supported by Internal Revenue Service

[21] Santangelo v. Santangelo, 137 Conn. 404, 78 A.2d 245 (1951), also indicates that such access to the courts by aliens is predicated on comity rather than domicile.



Revenue Ruling 74-364, 1974-2 C.B. 321. There, the Internal Revenue Service held that the *nondomiciliary* rate should be applied to the estates of G-4 aliens, reasoning that:

> The acceptance by the decedent of the prescribed terms for his admission to and stay in the United States, as required by Federal law and regulations relating to immigration and nationality, created a legal disability that rendered him incapable of forming the intention necessary for the establishment of a domicile here, as required by section 20.0-1 of the Estate Tax Regulations. This legal disability continued to exist until the time of decedent's death since he was still in the United States as an employee of an international organization holding a G-4 visa.[22]

Petitioner also relied below on *Seren v. Douglas*, 30 Colo. App. 110, 489 P.2d 601 (1971), which held that a student (F-1) visa holder was precluded by federal law (8 U.S.C. § 1101(a)(15)(F)(i) and § 1184(a)) from establishing state domicile in order to qualify for in-state tuition rates. In a highly selective reading of *Seren*, and a fundamental misreading of the immigration laws, the lower courts herein concluded that only those nonimmigrants expressly required by law not to abandon their residence in a foreign country (such as student visa holders) were prevented from acquiring a new domicile. On the contrary, the framers of 8 U.S.C. § 1101 found no need to spell out the requirements of nonabandonment of homeland for nonimmigrants who were obviously destined for a temporary stay in the United States

[22] Respondents have suggested that the force of Rev. Rul. 74-364 is weakened by a recent Tax Court decision, Escobar v. Commissioner, 68 T.C. 304 (1977), which held that a G-4 visa holder was a *resident* alien for income tax purposes. Rather than turning on an application of the law of *domicile* as did Rev. Rule 74-364, *Escobar* was decided on the basis of income tax regulations which specifically enabled nonimmigrants to show *residency* for income tax purposes in cases of "exceptional circumstances." Treas. Reg. § 1.871-2(b).

keyed to their employment. Under the lower courts' superficial analysis of 1101(a)(15), diplomats (A), foreign press (I), alien crewmen (D), and even aliens in transit (C), are not prevented from obtaining a domicile in the United States.

As Professor Rossberg has observed, such persons "are neither expected nor permitted to remain in this country indefinitely." 75 Mich. L. Rev. at 1111. Finally, this Court itself has lent credence to the truth of the presumption said to be at issue in this case. In *Nyquist v. Mauclet, supra,* the majority opinion noted:

> Since many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country, see, e.g., 8 U.S.C. § 1101(a)(15)(F)(i); 22 C.F.R. § 41.45 (1976), the bar . . . [presented by the New York statute] is of practical significance only to resident aliens.

53 L. Ed. 2d at 68.

In summary, Petitioner urges that whether gauged by the Maryland law of domicile or the immigration law, the University's decision to deny nonimmigrants domicile and thus in-state status is universally true in fact. Hence it cannot violate due process.

## III.

### RECENT DECISIONS OF THIS COURT HAVE SO ERODED *VLANDIS v. KLINE*, 412 U.S. 441 (1973), THAT THIS COURT SHOULD NOW DECLARE IT OVERRULED.

As the review of post-*Salfi* cases in Part I of this Argument has indicated, as members of this Court have noted, *Weinberger v. Salfi, supra* at 802-03, as legal commentators have chronicled, *see, e.g.,* J. Chase, *The Premature Demise of Irrebuttable Presumptions,* 47 U. Colo. L. Rev. 653 (1976), and as perceptive lower courts have mused, *see e.g., Miller v. Carter,* 547 F.2d 1314 (7th Cir. 1977), the continued vitality of *Vlandis v. Kline, supra,* is in grave doubt. A doctrine which demands perfection in legislative line-drawing even when constitutionally protected interests are not at stake, offends reasoned constitutional theory as well as the very nature of law-making. Petitioner joins the amici curiae in urging this Court to declare *Vlandis* overruled.



## CONCLUSION

In summary, Petitioner urges this Court to lay to rest a fundamental misapplication of the irrebuttable presumption doctrine, and that doctrine too. The lower courts incorrectly read that doctrine to mean that even if the University was generally and nearly universally correct in its legal interpretation of federal law and the law of domicile, it was constitutionally wrong. For these reasons, Petitioner contends that the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and *Vlandis v. Kline, supra,* should be overruled.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
GEORGE A. NILSON,
Deputy Attorney General
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
ROBERT A. ZARNOCH,
Assistant Attorney General,
1400 One South Calvert Building,
Baltimore, Maryland 21202,
Attorneys for Petitioner.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO ET AL.,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF FOR RESPONDENTS

ALFRED L. SCANLAN
JAMES R. BIEKE
734 Fifteenth Street, N.W.
Washington, D.C. 20005
(737-1255)

*Attorneys for Respondents*

*Of Counsel:*

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
(737-1255)

December 27, 1977

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases:*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-154

---

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO ET AL.,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

## BRIEF FOR RESPONDENTS

---

## QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in affirming the District Court's decision that the University of Maryland's policy of refusing to allow aliens holding non-immigrant "G-4" visas to prove Maryland domicile for purposes of obtaining the lower,

in-state rates for tuition and fees, while at the same time using domicile as the basis for awarding such rates, violates the Due Process Clause.

2. Whether the decision below can in any event be supported on the ground that the University's policy toward G-4 aliens violates the Equal Protection Clause by discriminating against a class of aliens.

3. Whether the decision below can be supported on the further alternative ground that the policy intrudes in areas reserved for federal regulation, in violation of the Supremacy Clause.[1]

## CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions set forth in the Brief of Petitioner, this case involves Article VI, Cl. 2 (Supremacy Clause) of the Constitution of the United States:

[1]The issues involving the Equal Protection and Supremacy Clauses were raised in the respondents' complaint in the District Court and were briefed and argued there. However, since the trial judge ruled in the respondents' favor on the due process question, those issues were not decided either in that court or by the Fourth Circuit, which summarily affirmed the trial court's decision. Those points, however, may properly be raised by the respondents in this Court, since the respondents "may make any argument presented below that supports the judgment of the lower court." *Hankerson v. North Carolina*, ____ U.S. ____, 53 L.Ed.2d 306, 314, n. 6 (1977), 45 U.S.L.W. 4707 (June 17, 1977), *Massachusetts Mutual Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1976); *Dandridge v. Williams*, 397 U.S. 471, 475 (1970); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931); and see Stern & Gressman, Supreme Court Practice, 314-315 (4th ed. 1969).



"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

## STATEMENT OF THE CASE

As permitted by Rule 38, the respondents at this point state facts which are relevant to this case but which were not set forth in the Brief of the Petitioner (hereinafter cited as "Pet. Br.").

The respondents are three students attending the University of Maryland. They reside in Maryland with their parents, upon whom they are financially dependent.[2] Their fathers are employees of international organizations – two employed by the Inter-American Development Bank ("IDB") and the third employed by the International Bank for Reconstruction and Development ("World Bank") – and as such hold non-immigrant alien visas issued pursuant to 8 U.S.C. §1101(a)(15)(G)(iv), known as "G-4" visas.[3]

[2]The petitioner suggests that respondent Juan Otero is now financially independent of his parents (Pet. Br. 12). This is not the case.

[3]G-4 visas are those issued to "[o]fficers, or employees of . . . international organizations [covered under the International Organizations Immunities Act, 22 U.S.C. 288], and the members of their immediate families."

The respondents entered the University as freshmen in the fall of 1974. Their applications for admission as Maryland residents and for "in-state" tuition rates were denied on the basis of a policy adopted by the University in September 1973. Under that policy, as the petitioner states, "the University . . . bases its award of in-state status on domicile" (Pet. Br. 11). Its policy document contains a general definition of domicile[4] and lists eight non-exclusive criteria for determining domicile (Pet. Br. 9). The University automatically denies in-state status to students who are, or are financially dependent upon, non-immigrant aliens – including holders of G-4 visas – because it presumes conclusively that such non-immigrant aliens "cannot establish the requisite intent necessary to create a Maryland domicile" (Pet. Br. 34).[5] We note, in particular, that one of the University's listed criteria for determining domicile is the payment of "Maryland income tax on all earned income" (Pet. Br. 9), and the international agreements establishing the IDB and the

[4] That definition is as follows:

> "A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time." Pet. Br. 8.

[5] Prior to September 1973, the University had also based the grant of in-state tuition rates on Maryland domicile, but had drawn no distinction between American citizens or permanent immigrants and aliens holding G-4 visas, so long as the parents of the student applicant had owned and occupied real property in Maryland for six months prior to the grant of in-state status. (Appendix (hereafter "App.") 22A, 24A).



World Bank preclude both the Federal Government and the States from collecting income taxes on the salaries received by any non-American citizens from those organizations.[6]

After unsuccessfully exhausting their administrative appeals within the University, the respondents filed a class action in the District Court on May 27, 1975. They alleged that the University's denial to G-4 visaholders and their children of the opportunity to prove in-state status violated the Due Process, Equal Protection, and Supremacy Clauses of the Constitution.[7] On July 13, 1976, the District Court ruled in the respondents' favor, holding that G-4 visaholders are not legally incapable of establishing Maryland domicile and that for the University, which bases its in-state rates on domicile, to presume conclusively that they are so incapable, without providing them the opportunity for a hearing on the question, is in these circumstances a denial of due process under *Vlandis v. Kline*, 412 U.S. 441

[6] See Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; and Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502. This tax exemption is granted for the benefit of the banks. The employees of the banks cannot waive the exemption. 40 Op. Atty. Gen. 131, 172-73 (1953).

[7] The District Court ultimately certified the suit as a proper class action. See Appendix to the Petition for a Writ of Certiorari (hereinafter "Pet. App.") at 50a-51a.

(1973), and similar cases.[8] The Fourth Circuit affirmed that ruling on April 28, 1977. 556 F.2d 573.

The particular facts with respect to each of the respondents are set forth in the District Court's opinion (Pet. App. 12a-15a). These show that the respondents are children of long-time employees of the two international organizations, and that the parents of the respondents have resided in Maryland and owned real estate in that State for periods of time varying from over 7 to over 15 years. The facts also establish that the respondents' parents have paid all Maryland taxes except taxes on their salaries paid by the IDB or the World Bank. The taxes paid include local real estate taxes, the state sales tax, motor vehicle, fuel, excise and other taxes, and in some cases federal and state income taxes on income other than salaries from the two international organizations. Two of the respondents attended elementary and secondary schools in the United States without interruption. The mother of one of the respondents is a citizen of the United States and is registered to vote in Maryland. All of the respondents' parents have their automobiles registered in Maryland. The respondents' fathers hold their positions with the banks on a long-term, indefinite basis; their employment is not for a fixed term or period of time. During the course of the appeal proceedings before University officials, the respondents

[8] Although the District Court stayed the effect of the judgment, it required the petitioner and the University to agree to a refund for the class represented by the respondents if the respondents prevailed on appeal. The same condition applies pending decision in this Court.



and their parents stated that they have no present intention to reside anywhere other than in Maryland.

We should also point out that the University has admitted that, under its policy for determining in-state admission and tuition status,[9] an *immigrant* alien could show Maryland domicile even if he was exempt from Maryland income tax (Pet. App. 42a). However, in order for a G-4 alien or any non-immigrant alien who plans to work in the United States (other than a child, spouse, or, in some circumstances, sibling of an American citizen or immigrant alien) to change his visa status to that of immigrant, he must obtain the certification of the Secretary of Labor that there are not sufficient workers in the United States who are able, willing, qualified, and available to perform that work, and that this employment will not adversely affect the working conditions of American workers. 8 U.S.C. §1182(a)(14).[10] With certain exceptions inapplicable here, obtaining such a certification requires the

[9] The University's policy embraces "Admission . . . Purposes" (Pet. Br. 6), as well as charge-differential purposes. Although not in the record, it is a fact that the number of out-of-state applicants who are accepted for admission to the University of Maryland, both on the graduate and undergraduate levels, constitutes a far smaller percentage of such applicants than is the case with respect to the number of in-state applicants who are accepted for admission out of the pool of in-state applicants.

[10] The petitioner claims that G-4 visaholders can acquire immigrant status without obtaining the labor certification if they do so as parents of citizens or permanent resident aliens (Pet. Br. 28 n. 15). However, under 8 U.S.C. §1182(a)(14), as amended by §5 of Pub. L. No. 94-571, 94th Cong., 2d Sess. (Oct. 20, 1976), 90 Stat. 2705, parents of citizens under 21 or of permanent resident aliens are no longer excluded from the labor certification requirement.

alien's employer to file a form relating to the alien's qualifications and a form containing a job offer to the alien. 29 C.F.R. §§60.3(e)(1) and (2) (1976). The IDB and the World Bank do not file such forms for several reasons. They are "international organizations," not United States employers, and they are required by the agreements establishing them to give "due regard to the importance of recruiting the staff on as wide a geographic basis as possible."[11] Thus, the banks cannot certify, as required by the prescribed job offer form, that they have looked for and cannot find United States citizens who are equally qualified. Moreover, the banks interpret the provision requiring due regard to be paid to "recruiting the staff on as wide a geographic basis as possible," and the establishment by Congress of a separate visa category for aliens working for international organizations, as inhibiting them from assisting staff members in efforts to acquire immigrant status in the United States while such persons are employed by the banks (App. 21, 24-25). Indeed, the banks prohibit their G-4 employees from so changing their visa status except in very exceptional circumstances (such as in the case of an employee about to retire). The respondents have no control over these policies of the IDB and the World Bank.

[11] Art. VIII, §5(e), 10 U.S.T. 3029, T.I.A.S. No. 4397; Art. V, §5(d), 60 Stat. 1440, T.I.A.S. No. 1502.



## SUMMARY OF ARGUMENT

### Due Process

The courts below relied on *Vlandis v. Kline*, 412 U.S. 441 (1973), to hold that the University of Maryland's policy barring all non-immigrant aliens, including the holders of G-4 visas, from proving Maryland domicile so as to obtain "in-state" tuition and fee status denied due process of law to the G-4 visaholders. In *Vlandis*, the Court struck down a Connecticut statute which purported to be concerned with residency in allocating the tuition and fee rates at the state university, but then barred all individuals who had applied to the University from out of State from ever showing residency in Connecticut, on the basis of a permanent and irrebuttable presumption that they were non-residents. The Court held that this irrebuttable presumption violated the Due Process Clause since it was not universally true in fact and since the State had reasonable alternative means of making the crucial determination of residence.

The present case is very similar to and is governed by *Vlandis*. The University of Maryland admittedly purports to be concerned with domicile as the test for in-state status; but it then denies to a group of individuals seeking to meet that test – G-4 and other non-immigrant visaholders – any opportunity to prove that they do so, on the basis of a conclusive presumption that they cannot have the requisite intent to establish Maryland domicile. Contrary to the petitioner's contention, this conclusive presumption is just as "permanent" as was the one in *Vlandis*. While in both cases a change in status (here a change in visa

status to immigrant, and in *Vlandis* a change in student status to non-student for a year) would give an individual a chance to prove in-state domicile, the conclusive presumption of non-domicile here is permanent for as long as the G-4 visaholders remain in G-4 status, just as the one in *Vlandis* was permanent for as long as the students remained in student status. Moreover, as shown on pp. 7 - 8 above, the IDB and the World Bank do not file the forms that are necessary in most cases for their employees to change their visa status from G-4 to immigrant.

The petitioner further contends that the conclusive presumption here, unlike that in *Vlandis*, is universally true in fact since, he claims, non-immigrant aliens cannot have the intent necessary to be domiciled in Maryland. As the District Court found, however, that conclusive presumption is not universally true in fact for G-4 visaholders. The University's own definition of domicile, which tracks the Maryland law, turns on the intention to live permanently or indefinitely in Maryland, and under Maryland law there is no reason why G-4 visaholders cannot have that intention. Likewise, nothing in the federal immigration laws precludes that intent. To the contrary, Congress specifically exempted the holders of G-4 visas and those in a few other non-immigrant visa categories from the requirement, applicable to most categories of non-immigrants, that they maintain a foreign domicile or that they enter the United States for only a specific temporary purpose. Thus, it is possible for G-4 visaholders to be domiciled in Maryland.

Furthermore, the interests asserted by the petitioner in support of the University's policy can no more



justify that policy than did the State's interests in *Vlandis*. Indeed, the petitioner's asserted interests of cost equalization and administrative efficiency were specifically rejected in *Vlandis*. The asserted interest in limiting expenditures to those with a greater national affinity was held by this Court in *Nyquist v. Mauclet*, ____ U.S. ____, 53 L.Ed.2d 63, 45 U.S.L.W. 4655 (June 13, 1977), to be an impermissible interest for a State. And the alleged interest in treating all non-immigrants alike cannot stand, in light of the fact that different categories of non-immigrants are in fact and under the federal immigration laws differently situated with respect to their ability to establish domicile in this country.

For these reasons, *Vlandis* compels the conclusion that the University's policy here denies due process.

The petitioner and his supporting *amici curiae*, however, argue that *Vlandis* has been so eroded by subsequent decisions of this Court that it should be overruled. They place primary reliance in this regard on *Weinberger v. Salfi*, 422 U.S. 749 (1975). While it is true that *Salfi* and subsequent cases put limits on a broad reading and applicability of the *Vlandis* rationale, they specifically preserved that case. And as this Court has recognized, the *Vlandis* doctrine, as limited in accordance with subsequent decisions to its core due process principle and as applied to cases with facts like those in *Vlandis* and the present case, falls plainly within the scope of procedural due process.

The Court in *Salfi* recognized a distinction, for due process purposes, between enactments that condition benefits upon compliance with a flat, objective eligibility criterion on which individuals can present

evidence, and enactments that condition benefits or detriments upon a particular fact that is deemed to be crucial and then, on the basis of a conclusive presumption that a certain class of people cannot meet that factual test, deny those people any opportunity to prove the contrary. This distinction is proper. Where the State makes clear its concern with a particular fact and makes that fact crucial to the entitlement to property or enjoyment of liberty, its use of a conclusive presumption to deny a certain class of people the opportunity to prove that fact, when that presumption is not universally true in fact, implicates established concerns of fairness and procedural due process. Of course, this does not mean that courts should search for such conclusive presumptions in all legislative enactments by looking behind the language of the enactments to the possible purposes for them. To do so would constitute undue judicial intervention into the legislative function. But such considerations do not apply where it is clear from the face of the enactment or is otherwise obvious that the enactment has made a certain fact crucial and then has concluded the inquiry into that fact for a certain class of people. It is plain here that, under the University's policy, Maryland domicile is the crucial fact for an award of in-state status, and that the University precludes all non-immigrant aliens from proving such domicile, on the basis of a conclusive presumption that they cannot have the requisite domiciliary intent. Since that conclusive presumption is not universally true in fact for G-4 visaholders, principles of procedural due process require a careful scrutiny of the policy.



Such a conclusive presumption could be justified only if the State's difficulties in determining the crucial fact through individualized hearings would be substantial and would outweigh the individual's interests affected. Here, the University's policy burdens the G-4 students' important interest in securing a public education, and the University would have very little difficulty in ascertaining their domicile or that of their parents through individualized hearings. The University already has a hearing procedure which it uses to inquire into the domicile of citizens and immigrant aliens, and indeed it uses that same procedure for non-immigrants to inquire into other facts (such as changes in immigration status). It would take little, if any, extra time for the University also to consider domicile for the holders of G-4 visas and of those few other visa types that permit establishment of an American domicile, particularly since there would appear to be relatively few such visaholders. In these circumstances, the Due Process Clause requires the holding of individual hearings on the crucial fact – domicile – rather than the use of the unfair conclusive presumption.

Application of the *Vlandis* doctrine under this analysis is consistent with the decisions cited by the petitioner, has been recognized by members of this Court and by commentators, and comports with recognized principles of procedural due process. Hence, *Vlandis* should be preserved as applied under that analysis, and such application here shows that the University's conclusive presumption of non-domicile for G-4 visaholders was properly held by the lower courts to constitute a denial of due process.

### Equal Protection

While the courts below did not reach the respondents' argument that the University's policy violates the Equal Protection Clause, the respondents reassert that argument here and show that it provides a separate and wholly adequate ground for affirming the judgment below.

This Court's decision last Term in *Nyquist v. Mauclet, supra,* reaffirmed the established principle that state classifications based on alienage are inherently suspect and are subject to strict judicial scrutiny in determining whether they violate the Equal Protection Clause. In that case, moreover, the Court held that this principle applies not only to classifications that harm *all* aliens, but also to classifications that harm only a subclass of aliens, so long as only aliens are disadvantaged.

*Nyquist* directly governs this case. The University's policy at issue here clearly treats non-immigrant aliens differently from citizens and immigrant aliens. Citizens and immigrant aliens are permitted to prove Maryland domicile and thus to obtain in-state status. Non-immigrant aliens are not. The petitioner's contention that the policy is not a discrimination against the non-immigrant class of aliens, but only against non-domiciliaries of Maryland, is based on his position that non-immigrant aliens as a class are in fact unable to be domiciled in Maryland. As we have stated, this is not necessarily or universally true for the holders of G-4 visas and the few similar types of visas that permit creation of an American domicile. Yet the G-4 and similar non-immigrant visaholders who are in fact



domiciled in Maryland are precluded by the University's policy from proving their domicile. Citizens and immigrant aliens domiciled in Maryland face no such restriction. This classification obviously is directed at and disadvantages *only* aliens (even though not all aliens) and hence, under *Nyquist,* is a suspect classification subject to struct scrutiny.

As the petitioner has conceded, the interests asserted in support of the University's policy will not withstand a strict scrutiny test. Therefore, the policy denies to G-4 visaholders the equal protection of the laws.

### Supremacy Clause

The respondents finally assert, as an additional alternative ground for affirmance, that the University's policy intrudes upon the exclusive federal power and policies in the immigration field, in violation of the Supremacy Clause of the Constitution.

## ARGUMENT

### I.

### THE UNIVERSITY'S POLICY BARRING HOLDERS OF G-4 VISAS FROM THE OPPORTUNITY TO PROVE MARYLAND DOMICILE VIOLATES THE DUE PROCESS CLAUSE.

In the courts below, the respondents relied successfully on *Vlandis v. Kline,* 412 U.S. 441 (1973), in

maintaining that the University's policy of denying absolutely an opportunity for the holder of the G-4 visa to show that he is domiciled in Maryland violated the Due Process Clause. In *Vlandis*, this Court, relying on principles previously invoked in *Bell v. Burson*, 402 U.S. 535 (1971), and *Stanley v. Illinois*, 405 U.S. 645 (1972), held unconstitutional a Connecticut statute which set up a mechanical and automatic bar, similar to the University's policy here, that prohibited certain students from showing residence in the State for purposes of obtaining in-state rates for tuition and fees at the state university. The Connecticut statute established a presumption that a student was a non-resident – and thus barred him from showing that he had established domicile in Connecticut – if he had a legal address outside the State during the year before he applied (if single) or at the time of his application (if married). This Court held that it was a denial of due process to establish such a presumption and to deny an applicant the right to prove that his domicile was within the State either at the time of application or at a subsequent time during the period of his attendance at the University. The Court stated:

> "It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category. Indeed, in the present case, both appellees possess many of the indicia of Connecticut residency, such as year-round Connecticut homes, Connecticut drivers' licenses, car registrations, voter registrations, etc. . . ." 412 U.S. at 448.



The Court summarized its holding as follows:

> "In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." 412 U.S. at 452.

The present case is very similar to *Vlandis*. The University admittedly purports to be concerned with domicile in determining admission and in allocating the rates for its tuition and fees.[12] Yet it has erected an irrebuttable presumption that the holders of G-4 and other non-immigrant visas may never be domiciled in Maryland for purposes of admission and of obtaining in-state tuition and fee status.[13] It makes no attempt to

---

[12] See Pet. Br. 11, stating that like "most other public institutions of higher education, the University of Maryland bases its award of in-state status on domicile"; Pet. App. 32a, where the District Court noted that, according to the defendants, "domicile is the basis on which tuition rates are determined"; and Pet. App. 41a, where the District Court itself referred to the determination of domicile as the "crucial determination" under the University's policy.

[13] See Pet. Br. 11, which states that "the University does not further examine other domiciliary factors because such individuals [*i.e.*, non immigrant aliens] cannot have the requisite legal intent to establish Maryland domicile." Similarly, the University "views nonimmigrant aliens as being under a legal disability which precludes the intent to be domiciled in Maryland . . ." Pet. Br. 11. See also Pet. Br. 12, 34, and 35.

distinguish between those G-4 aliens (or other non-immigrant aliens) who may intend to reside indefinitely in Maryland and thus, under the properly considered indicia, would be considered domiciled there, and those who do not so intend. Rather, it simply treats all such non-immigrant aliens as non-residents of the State, and denies them in-state treatment for purposes of admission and tuition rates, on the basis of a conclusive presumption that they are not Maryland domiciliaries. For this reason, the courts below relied on *Vlandis* to strike down the University's policy as a denial of due process.

The petitioner in this Court advances two basic arguments why the decision below should be reversed: (1) that the courts below misapplied *Vlandis* to the facts of this case and that therefore *Vlandis* does not govern here; and (2) that *Vlandis* has been so eroded by subsequent decisions that this Court should overrule it. We now show that neither of these contentions should prevail.

### A. The Present Case Is Governed by *Vlandis v. Kline*.

The petitioner's initial argument is that this Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and subsequent decisions show that *Vlandis* was improperly applied by the courts below in the instant case, because under *Salfi* and its progeny classifications which do not affect "fundamental" constitutional rights do not give rise to irrebuttable presumptions in violation of the Due Process Clause if such presumptions are rationally related to a legitimate objective



(Pet. Br. 16-17, 18-26). In effect, the petitioner's argument here is that *Salfi* and subsequent cases of this Court have overruled *Vlandis*, since the right affected by the statute in the latter case was no more "fundamental" than that at stake in the present case, and since, as shown above, the policy of the University of Maryland creates a conclusive presumption just as much as did the statute which this Court struck down in *Vlandis*.

While this Court's decisions in *Salfi* and subsequent cases cut back on the broad applicability of *Vlandis*, they did not overrule it, but left it standing as applied to its facts and to similar cases. In *Salfi*, for example, the Court specifically distinguished and preserved *Vlandis* as applied to cases like it and the present case, where the State purports to be concerned with a particular factual test (*e.g.*, residency or domicile) and then denies individuals seeking to meet that test the opportunity to present and have considered plainly relevant evidence of the fact deemed crucial. 422 U.S. at 771, 772. This distinction drawn in *Salfi* is discussed more fully on pp. 43-44, *infra*. Likewise, as also discussed below (pp. 57-61, *infra*), the other cases cited by the petitioner did not overrule *Vlandis*.

Thus, *Vlandis* has not been overruled. The question whether *Salfi* and subsequent cases have so eroded *Vlandis* that it is no longer viable and should now be overruled is discussed on pp. 47-66, *infra*. However, before answering this major contention of the petitioner – and of the amici curiae supporting him – we will demonstrate that, for due process purposes, the present case is indistinguishable from *Vlandis* and that *Vlandis* therefore controls the result here.

**1. The University's Policy Here Creates a Conclusive Presumption Like That in *Vlandis*.**

In fashioning its admissions policy and in allocating its rates for tuition and fees, the University of Maryland purports to be concerned with domicile as the test for in-state status.[14] Yet at the same time, it denies to a group of individuals seeking to meet that test – G-4 visaholders – any opportunity to prove that they are domiciled in Maryland. The University's policy thus establishes an irrebuttable presumption like that in *Vlandis*, which concludes, without a hearing, any inquiry into the fact that the University deems crucial.

The petitioner attempts to distinguish the presumption here from that in *Vlandis* by maintaining that, unlike the students in that case, "who could never qualify for in-state status" (Pet. Br. 27), these respondents do have the opportunity to qualify for in-state status by altering their immigration status, or having their parents alter theirs, to that of permanent resident alien. Therefore, the petitioner argues, the presumption here is not permanent (Pet. Br. 27-28). For this point, he relies on *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd.*, 401 U.S. 985 (1971), where the lower court upheld a one-year residency requirement which allowed students from out of state to present evidence of in-state residence after living in the state for one year.[15]

[14]See references cited in note 12, p.17 , *supra*.

[15]Pet. Br. 19, 27-28. The petitioner also cites *Kirk v. Board of Regents of the University of California*, 78 Cal. Rptr. 260, 273 Cal. App. 2d 430 (1969), *app. dism.*, 396 U.S. 554 (1970), where a similar one-year residency requirement for in-state status was upheld.



This attempted distinction of *Vlandis* cannot stand up. Contrary to the petitioner's contention, the students in *Vlandis could* have qualified for the in-state rates by moving to Connecticut for a year before applying to the university or by dropping out of the university for a year, living in Connecticut for that year, and then reapplying. Such a possibility of a change in status could not save the irrebuttable presumption in *Vlandis*, for the presumption was permanent for as long as the students remained in student status. See 412 U.S. at 453 n. 9. By contrast, the regulation in *Starns* allowed students to meet the one-year residency requirement while in student status. No change in status was required. The University of Maryland's policy at issue here is like that in *Vlandis* rather than that in *Starns*. Its irrebuttable presumption of non-domicile is permanent for as long as the students or their parents remain in G-4 status. The fact that they might change their status in order to avoid the presumption, as the students in *Vlandis* also could have done, cannot cure the constitutional defect.[16]

[16]Moreover, the requirement that G-4 visaholders change their status from G-4 to permanent resident in order to be eligible for in-state treatment at the University would impose an arbitrary and unreasonable burden on such individuals. As discussed on pp. 7-8, *supra*, the IDB and the World Bank do not file the forms necessary for their employees to adjust their visa status to permanent resident, and indeed prohibit their employees from making such a change except in unusual circumstances. Thus, the theoretical possibility of a change in visa status for employees of these international organizations cannot save the University's irrebuttable presumption of non-domicile for these G-4 aliens from unconstitutionality. See *Robertson v. Regents of the University of New Mexico*, 350 F. Supp. 100, 101-02 (D.N.M. 1972); accord, *Covell v. Douglas*, 501 P.2d 1047, 1048 (Colo. 1972).

**2. The Interests Asserted in Support of the University's Policy Can No More Justify That Policy Than Did the State's Interests in *Vlandis*.**

The petitioner asserts several interests of the University which, in his opinion, suffice to justify its policy with respect to the admission and tuition status of non-immigrant aliens, including holders of G-4 visas. As in *Vlandis*, however, these interests do not suffice.

(a) First, the petitioner purports to draw comfort from this Court's decision in *Mathews v. Diaz*, 426 U.S. 67 (1976), upholding a congressional scheme that granted Medicare benefits to citizens and permanent resident aliens who had resided in this country for at least five years, but denied such benefits to other aliens. That scheme was upheld on the grounds that the amount of such benefits was not limitless and that Congress could reasonably draw the line as it had because as a class the persons to whom benefits were granted could be expected to have a greater affinity with the United States. *Id.* at 83. The petitioner contends that this same "national affinity" interest can justify the University's policy here (Pet. Br. 29-31).

In *Mathews v. Diaz*, however, the Court based its decision squarely on the plenary power of the Congress over aliens, which is, for the most part, "committed to the political branches of the Federal government." *Id.* at 81. Moreover, the Court made it clear in *Mathews* that the considerations and policies applicable in that area do not apply to *state* actions affecting aliens. *Id.* at 84-87. In *Nyquist v. Mauclet* ____ U.S. ____, 53 L.Ed.2d 63, 71, 45 U.S.L.W. 4655 (June 13, 1977), the Court last Term



confirmed explicitly that the "national affinity" interest "is not a permissible one for a State."[17]

(b) Next, the petitioner claims that "the University's in-state policy is a rational attempt to achieve cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, *viz.* nonimmigrants and other nonresidents" (Pet. Br. 31).

The purported justification based on an attempt at cost equalization according to past tax contributions is precisely the interest rejected in *Vlandis* as insufficient to justify the irrebuttable presumption of nonresidence. 412 U.S. at 448-50. Moreover, like the presumption in *Vlandis*, the University's policy here is unrelated to the objective of cost equalization. Its policy would allow a citizen or immigrant visaholder whose family had lived in Maryland only a very short time and had not contributed significantly to the State's tax revenues to

---

[17] In *Nyquist*, the Court held that a state statute which barred a certain class of aliens from receiving education benefits discriminated against that class of aliens in violation of the Equal Protection Clause. The petitioner attempts to distinguish *Nyquist* on the ground that the University's policy here does not discriminate against a class of aliens, but treats all non-domiciliaries of Maryland alike, including citizens and immigrant aliens as well as non-immigrant aliens (Pet. Br. 30). We answer this contention below in connection with our equal protection argument. See pp. 71-72, *infra*. As we show there, the University's policy does not treat non-immigrant aliens as it does citizens and immigrant aliens. Citizens and immigrant aliens are permitted to show Maryland domicile. Non-immigrant aliens are not, even if they are in fact domiciled in Maryland (which, as we show on pp. 29-41, *infra*, is possible for G-4 visaholders).

pay in-state rates. But it denies those rates to the respondents, despite the fact that each respondent's family has resided in Maryland for a number of years (Moreno, 13 years; Otero, 11 years; Hogg, 6 years), and has paid all Maryland state and Montgomery County property taxes on their homes, as well as all state and local retail taxes, motor vehicle taxes, fuel taxes, excise taxes, and other taxes required of them by law. See Pet. App. 12a-15a.

Furthermore, the lack of a relationship between the University's policy and the asserted interest in cost equalization based on tax payments is shown by the fact that officials of the University have formally stated that it is their policy to permit the parent of a student, if such parent holds an *immigrant* visa, to establish domicile in Maryland, whether or not the parent currently pays Maryland income tax, provided that such a parent can exhibit all the other relevant domiciliary criteria (Pet. App. 42a n. 15). If an alien holding a G-4 visa and employed by an international organization, such as those employing respondents' fathers, succeeded in changing his status to that of immigrant, as the University requires, his salary from the organization would still be exempt from federal and state income tax. He would thus have taken the steps required by the University with regard to his immigration status and would be allowed to show Maryland domicile for purposes of obtaining the in-state rates for his family, but he would not have advanced the University's asserted objective of "cost equalization" one iota.

(c) Another allegedly "sufficient interest" in support of the University's policy on in-state status is said by the petitioner to be "the administrative difficulties presented by individualized hearings for the University's



large nonimmigrant student population" (Pet. Br. 32). Such an asserted interest, too, was rejected in *Vlandis*, 412 U.S. at 451-52, as well as in *Stanley v. Illinois*, *supra*, 405 U.S. at 656, as insufficient to justify use of the irrebuttable presumptions there. In this case, as in *Vlandis*, the University has a reasonably available method, apart from relying on its irrebuttable presumption, to ascertain whether G-4 visaholders in fact have the intent required for domicile in Maryland. It is the method used for American citizens and, according to the most recent expression of the University's policies, for those who hold immigrant visas – namely, collecting documents and conducting interviews in accordance with the procedures set forth in the University's September 21, 1973, Statement of Policy (Pet. Br. 6-10). Indeed, even the respondents were required to submit materials and to appear for extensive interviews pursuant to these procedures, although the evidence they presented on the question of their domicile in Maryland was deemed irrelevant and not considered in denying them in-state status (App. 6A-9A). In order to have a true fact-finding method to determine the domicile of G-4 aliens, the University need only assess objectively the information which it now holds but insists it must ignore.

Moreover, the University's speculative concern at the increase in the number and scope of individualized hearings which might be required if the respondents should prevail in this case cannot be given much weight. Although not a fact in the record of this case, the petitioner states that in the Fall of 1975 "more than 550 nonimmigrants were registered at the University of Maryland" (Pet. Br. 32 n. 18). On the other hand,

respondents can assure the Court that of the 550 or so non-immigrants whom the petitioner estimates to be in attendance at the University, just over 50 students are children of G-4 visaholders who are employed by the IDB and the World Bank. Even allowing for additional students at the University who are children of employees of the International Monetary Fund, the Organization of American States, and a few other international organizations whose headquarters are located in the Washington, D.C. area, it is not likely that the total number of students in the class for whom the respondents speak would be much more.[18] Apart from G-4 visas, there are many other categories of non-immigrant visas; and it seems probable that the great majority of non-immigrant alien students at the University of Maryland fall into visa categories which, as we discuss in more detail below, unlike the G-4 visa, may not permit the establishment of American domicile.[19] For example, many are undoubtedly foreign students who are temporarily in the United States pursuant to a visa which requires such students to have "a residence in a foreign country which [they have] no

[18]Furthermore, of course, only about a quarter of the G-4 students in the University would be entering the University in any one year.

[19]In this connection, it is instructive to note a citation by the petitioner to the effect that the number of non-immigrants admitted each year exceeds 3 million (Pet. Br. 31 n. 17). We have been informed by the Director of the Public Information Office of the Immigration and Naturalization Service that the number of G-4 visaholders in the United States as of November 1977 was 25,142. Of this number, surely well under 100 attended the University of Maryland.



intention of abandoning." 8 U.S.C. §1101(a)(15)(F). That the University will have to make an individualized determination of domicile as to those non-immigrant students whose visas *do* allow the establishment of Maryland domicile, as G-4 visas do, by following the very same procedures that it currently uses for citizens and permanent resident aliens, would certainly create no more, and probably less, additional administrative burden than did the individualized determinations required in *Vlandis* and *Stanley*. That alleged burden on the University, therefore, cannot justify its use of the irrebuttable presumption of non-domicile for all G-4 aliens.[20]

(d) The petitioner's final assertion of an interest purportedly justifying the University's policy is that that policy prevents "disparate treatment" among non-immigrant aliens (Pet. Br. 32-33). The petitioner contends that for the University to permit G-4 and similar non-immigrant visaholders who do not have to maintain an overseas domicile the opportunity to show Maryland domicile, while at the same time denying that opportunity to other non-immigrants, such as foreign students who are in this country temporarily and must

[20]We point out further that most of the States who have joined in the brief for amici curiae in support of the petitioner would have a very minimal interest in whether G-4 aliens are allowed to prove in-state domicile. The Washington, D.C., and New York City areas are the two areas where international organizations have their headquarters in this country; and hence it is highly unlikely that there would be any appreciable number of G-4 visaholders in States other than the six in those areas—namely, the District of Columbia, Maryland, Virginia, New York, Connecticut, and New Jersey.

maintain an overseas domicile, affords the former class "preferential treatment," which ought not to be allowed.[21] The short answer to this argument is that it seeks to equate persons who are in fact and under the federal immigration laws differently situated. That is, it would draw no difference between persons who are in the United States temporarily and for limited purposes – such as foreign students, temporary visitors for business or pleasure, aliens "in immediate and continuous transit," 8 U.S.C. §1101(a)(15)(C), alien crewmen

[21] As he did earlier in his brief (Pet. Br. 13-14 n. 5), the petitioner again refers to the holders of G-4 visas as "generally affluent" aliens, *id.* at 33, who, he says, "hold lucrative and responsible positions with their respective employers," *id.* at 14. There is, of course, no evidence in the record that the holders of G-4 visas, as a class, are more affluent than any other non-immigrant aliens, such as the parents of foreign students who attend the University of Maryland on a student visa. Moreover, as the respondents have pointed out in this brief, the exemption from federal and state income taxes which the employees of the two banks enjoy applies only to the salaries which they receive from the banks and not to any other income they may receive. Finally, the immunities and exemptions afforded to employees of international organizations are strictly "functional" in nature and are not to be equated with the complete diplomatic immunity enjoyed by ambassadors, personal representatives of foreign nations, and other diplomats stationed in the United States. See Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 Wash. & Lee L. Rev. 91, 128-130 (1976). In any event, the relevancy of the salary which the respondents' fathers receive, the scope of their privileges and immunities as employees of international organizations, and the fact that they, as employees of those organizations, are exempt from federal and state income tax on their salaries eludes the respondents.



who intend to land "temporarily and solely in pursuit of [their] calling," 8 U.S.C. §1101(a)(15)(D), etc. – and aliens, like the respondents, whose parents intend to reside in the United States indefinitely and to live permanently and indefinitely in Maryland. See pp. 35-37, *infra*.

### 3. The University's Conclusive Presumption of Non-Domicile for G-4 Visaholders Is Not Universally True.

The petitioner also argues that even if the University's policy has erected a permanent irrebuttable presumption of non-domicile for all non-immigrant aliens, including G-4 visaholders, such a presumption is nevertheless valid under *Vlandis*, for it is, according to the petitioner, universally true in fact (Pet. Br. 33-38). This is so, the petitioner contends, because non-immigrant aliens "cannot establish the requisite intent necessary to create a Maryland domicile for in-state tuition because of the terms and conditions upon which they continue to reside in this country" (*id.* at 34). The District Court, however, found to the contrary (Pet. App. 32a-40a); and this Court has held that, even where the state courts have not ruled on a question of state law, the Court will afford great deference to the construction of state law by the district judge who sits in the State and whose construction was upheld by the court of appeals. *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976). In any event, the District Court's finding on the point in question here was clearly correct.

As stated above, the University, in determining admission and rates for tuition and fees, purports to be

concerned with the domicile of the student or his parents. The University's statement of policy of September 21, 1973, defines domicile as follows:

> "A domicile is a person's permanent place of abode; namely, there must be demonstrated an *intention* to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time" (Pet. Br. 8) (emphasis added).

The same statement lists a set of eight criteria which the University is to consider in determining domicile, including: year-round ownership, rental, or occupation of property; the maintenance of a substantially uninterrupted presence within Maryland; the maintenance within Maryland of personal possessions; the payment of Maryland income tax on all earned income; the registration of motor vehicles in Maryland; the possession of a Maryland driver's license; registration to vote in Maryland, if registered; and the giving of a Maryland home address on federal and state income tax forms (Pet. Br. 9).

As the September 21, 1973, statement indicates, however, these indicia are only criteria to be considered in assessing a person's intent. This primary role of intent in establishing domicile is in accord with the broadly accepted view. As this Court said in *District of Columbia v. Murphy*, 314 U.S. 441, 454-455 (1941), "we hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly domiciled" (footnote omitted). See also Restatement of Conflicts (2d), §18. Likewise, as the petitioner states, "[t]he University's in-state policy tracks the [Maryland] law of domicile" (Pet. Br. 34). The Maryland Court



of Appeals defined domicile in *Shenton v. Abbott*, 178 Md. 526, 530, 15 A.2d 906, 908 (1940):

> "A person's domicile is the place with which he has a settled connection for legal purposes, either because his home is there or because that place is assigned to him by the law. It is well defined as that place where a man has his true, fixed, permanent home, habitation and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning."

The court made clear that, if a person has established a new domicile, a "floating intention to return to his former domicil at some future time" does not negate the intent to establish the new domicile. *Id.*, 178 Md. at 533, 15 A.2d at 909.

There can be no doubt that G-4 visaholders, such as the respondents and their families in this case, can exhibit all relevant indicia of having domiciles in Maryland under the "permanent or indefinite intention" standard of the University's policy and of state law. Respondents and their parents have all lived in the United States and in Maryland for a number of years, own their own homes in Maryland, maintain substantially all personal possessions in Maryland, and do not maintain residences elsewhere. All have registered their automobiles in Maryland and hold Maryland drivers' licenses. None votes outside Maryland; Mrs. Otero, an American citizen, votes in Maryland. All give a Maryland home address when they file state and federal income tax forms.

Moreover, the respondents and their parents pay all Maryland state taxes lawfully levied upon them. The father in each family is employed by an international

organization. Pursuant to international agreements to which the United States is a party, no state or federal income tax may be levied on the salaries of non-American employees of the organizations employing respondents' fathers, the IDB and the World Bank.[22] This arrangement is not a gratuitous benefit conferred on the respondents' fathers by the United States, but is for the benefit of the organizations and their member nations. Under the same agreements, reciprocally, no foreign income tax may be levied on United States citizens residing abroad in the banks' employ. Thus, no Maryland state income tax is paid upon the income from each father's salary, although, in the case of one family, the Hoggs, Maryland state income tax is paid on other income (App. 10A).

The University has had ample opportunity to be fully informed on all indicia relevant to the respondents' and their parents' domicile through the documentary materials they have required the respondents to submit and through the extensive personal interviews with the respondents and their fathers conducted by the Director of Admissions and the Assistant Director of Admissions. See p. 25, *supra*.

[22]Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397, Art. XI, §9(b) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to . . . employees of the Bank who are not local citizens or other local nationals"); Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502, Art. VII, §9(b) (wording identical to that for the IDB, but concluding ". . . local citizens, local subjects, or other local nationals").



The employment of respondents' fathers at the World Bank and the IDB does not conflict in any way with the intent necessary in order to establish domicile in the State of Maryland. Each of respondents' fathers has come to the headquarters of the international organization in question to pursue a full career at that location. Each has been employed at that location for 13-14 years and has no intention to work elsewhere. The Restatement of Conflicts (2d), Section 17h, draws a distinction, for purposes of establishing domicile, between jobs that constitute "life" appointments and appointments of a "cabinet" nature. Officials such as cabinet members serve at the pleasure of elected officials; ordinarily a change of political party or a change of administration will mean that their tenure is ended. A similar consideration applies to ambassadors and their staffs. But respondents' fathers' positions at the international organizations involved here are, for all practical purposes, "life" appointments, since they serve at the pleasure of no political administration and the nature of their work and of the organizations' operations are such that they may presumably expect to reside in the Washington area for their entire careers.[23] The circumstances might be different for an official who (unlike the employees of the IDB and the World Bank) had a job that required him to rotate frequently to posts outside Maryland. Even in such a case, however, once such an official established a

[23]For a comprehensive discussion of the status of the employees of international organizations, see Gormley, *The Future Privileges and Immunities Required by the Personnel of Regional and International Organizations from the Jurisdiction of American Courts*, 32 Univ. of Cincinnati L. Rev. 131 (1963).

domicile in Maryland, it would be retained until a new domicile was clearly adopted. Two Maryland cases have so held. *Comptroller v. Lenderking*, 268 Md. 613, 303 A.2d 402 (1973) (Foreign Service Officer did not lose Maryland domicile by going to Japan on temporary assignment and then returning to live with friends in Virginia); *Knapp v. Comptroller*, 269 Md. 697, 309 A.2d 635 (1973) (taxpayer established residence in Pennsylvania for business purposes but returned often to Maryland where many indicia showed his domicile remained).

Moreover, contrary to the petitioner's contention, the fact that the respondents and their fathers hold G-4 non-immigrant visas does not necessarily preclude them from having the requisite intent, and demonstrating sufficient indicia thereof, to establish domicile in Maryland. Visa status as such has nothing to do with whether an alien may or may not be planning to stay indefinitely in the United States. The period of validity for a non-immigrant visa relates *only* to the period during which an alien may apply for *admission* to this country, and such periods are determined by reciprocal agreements with other countries. 22 C.F.R. §41.122(b) and (c). This period of validity for *admission*, by the terms of the relevant federal regulations, "*shall have no relation* to the period of time the alien may be authorized by the immigration authorities to *stay* in the United States . . . ." 22 C.F.R. §41.122(a) (emphasis added). As the District of Columbia Court of Appeals stated, in holding that a British citizen employed by the International Monetary Fund and residing in the District of Columbia had established domicile there:



> "*A visa is a document of entry* required of aliens by the United States Government and is a matter under the control of the Government. *It has little relevance to the question of domicile.* The fact that appellee entered the United States on a nonimmigrant visa to work for the I.M.F. does not preclude a finding that appellee could become domiciled in the District of Columbia." *Alves v. Alves*, 262 A.2d 111, 115 (D.C. App. 1970) (emphasis added).

It is clear from the statutory provisions under which a G-4 visa is issued that it does not, by its terms, preclude establishing the requisite intent for domicile in Maryland or any other State. On the contrary, analysis of the relevant provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, shows that those who hold G-4 visas are among the few non-immigrants whom Congress specifically chose to exempt from the requirement that they maintain a foreign domicile or that they enter the United States for a specific temporary purpose.

The twelve major categories of non-immigrant aliens are listed at 8 U.S.C. §§1101(a)(15)(A)-(L). For most of these categories, Congress either has required explicitly that aliens in that category maintain a domicile overseas or has approved their entry for only a specific temporary purpose. These include: temporary visitors for business or pleasure "having a residence in a foreign country which [they have] no intention of abandoning," §1101(a)(15)(B); aliens "in immediate and continuous transit," §1101(a)(15)(C); alien crewmen who intend to land "temporarily and solely in pursuit of [their] calling," §1101(a)(15)(D); foreign students "having a residence in a foreign country which [they

have] no intention of abandoning," §1101(a)(15)(F); aliens coming to perform services of an exceptional nature, to perform temporary work, or to be trained, "having a residence in a foreign country which [they have] no intention of abandoning," §1101(a)(15)(H); certain students and teachers on State Department programs, "having a residence in a foreign country which [they have] no intention of abandoning," §1101(a)(15)(J); fiances and fiancees of American citizens coming "solely to conclude a valid marriage with the petitioner[s] within ninety days after entry," §1101(a)(15)(K);[24] and corporate employees "who seek to enter the United States temporarily in order to continue to render [their] services to the same employer[s] . . . ," §1101(a)(15)(L).

Subsection (G)(iv), however, provides, in its entirety, that the category of aliens included therein are:

> "[O]fficers, or employees of such [previously indicated] international organizations, and the members of their immediate families," §1101(a)(15)(G)(iv).

Thus, G-4 visaholders – along with a few other limited categories of non-immigrant visaholders, such as those who enter under certain treaties of commerce (§1101(a)(15)(E)) and certain foreign media representatives (§1101(a)(15)(I)) – were particularly exempted by Congress from the requirement either that they maintain foreign domicile or that they enter the United States for only a temporary purpose – requirements

[24]Of course, the accomplishment of this particular temporary purpose will often lead to a later establishment of immigrant status.



placed upon other non-immigrant categories. If Congress had intended to place such domiciliary restrictions on these visaholders, it would have been a simple matter to have included in the relevant subsections language similar to that included, *inter alia*, in the other subsections, discussed above. Or if Congress had intended to establish a general rule against the establishment of domicile in the United States by all non-immigrants, it could easily have said so. Instead, it drafted each statutory provision dealing with each category of non-immigrants in such a way that some non-immigrants were under domiciliary restrictions and some, including those holding G-4 visas, were not. "Immigrants" or "permanent residents" was made a residual category under the statute, consisting of all those who were not admitted under one of the specific non-immigrant visas. There is no evidence whatever that Congress intended that only those aliens in that "immigrant" category should be admitted on terms which would permit the establishment of a domicile in this country. Indeed, the structure of the statute strongly suggests that Congress intended such freedom for a few selected categories of non-immigrants as well, including those admitted under subsection G(iv).[25]

[25]This reasoning is supported by *Gosschalk v. Gosschalk*, 48 N.J.Super. 566, 138 A.2d 774, *aff'd*, 28 N.J. 73, 145 A.2d 327 (1958). In that case, an alien held a temporary visitor's visa under 8 U.S.C. §1101(a)(15)(B), which was extended periodically so that he could remain for trading purposes; it was recognized that he would have been eligible for "treaty trader" status under subparagraph (E) of 8 U.S.C. §1101(a)(15) if the appropriate treaty between the U.S. and the Netherlands had been in force. As noted above, this latter status is similar to that of a G-4 visaholder in that it is one of the few non-immigrant visas which does not require the visaholder to maintain a foreign

[continued]

The petitioner, in arguing to the contrary, relies upon a general regulation of the Immigration and Naturalization Service (8 C.F.R. §214.1) (Pet. Br. 35). Among other things, this regulation requires all non-immigrant aliens to agree to abide by the terms and conditions of admission and to "depart" when their period of admission expires or when they abandon their non-immigrant status. The petitioner seeks to interpret the word "depart" in this regulation wholly out of context in such a way as to imply that the holding of a G-4 visa is incompatible with an intent to reside indefinitely in Maryland. Under 8 C.F.R. §214.2(g), aliens holding G-4 visas are admitted to the United States for such period of time as they are recognized by the Secretary of State, which is normally for the duration of their employment. As we have noted (pp. 7-8, *supra*), if such aliens develop an intent to remain here for the indefinite future, there are good reasons why they may have to wait until their retirement arrives or approaches in order to change their status to that of immigrant. In the past, an alien who wished to change his visa status to that of an immigrant upon retirement may or may not have been required to "depart" the United States in order to do so. 1 Gordon & Rosenfield, Immigration and Procedure, §2.6 at 2-37, §7.7 (1975). Under recent amendments to the Immigration Act, they need

*(footnote continued from preceding page)*
domicile or to be visiting the United States temporarily. The court noted that it was only if the alien's presence in the United States were illegal that he would not be able to establish a domicile here, and it cautioned that domicile should not be confused with capacity for naturalization. 138 A.2d at 779.



not depart at all.[25] But even under the prior Act, under which natives of a Western Hemisphere nation might be required to "depart" in order to change their status, such temporary "departure" in no way necessarily negates an intent to continue to reside in this country. It is self-evident that a person who is domiciled in one place may still travel temporarily to another without abandoning his domicile.

Before concluding this discussion of why the University's permanent irrebuttable presumption of non-domicile for G-4 visaholders is not universally true, we deal briefly with the limited authorities again offered by the petitioner on this issue, despite the trial judge's rejection of those authorities (Pet. App. 38a-40a). Petitioner's reliance here is on Revenue Ruling 74-364, 1974-2 C.B. 321, and *Seren v. Douglas*, 30 Colo. App. 110, 489 P.2d 601 (1971) (Pet. Br. 37), Neither suffices.

The Revenue Ruling held that the holder of a G-4 visa was not domiciled in the United States for federal estate tax purposes. It was based on the above-discussed requirement that he "depart" at the expiration of the period of his admission. As shown above, however, and as the district court held, "under federal law a G-4 alien is capable of remaining in Maryland indefinitely and, therefore, has the legal capability to have the necessary intent to establish a Maryland domicile," and hence "[a]s an explication of the *law of domicile*, . . . the Revenue Ruling is in error" (Pet. App. 38a-39a). Moreover, the concepts of domicile and residency for

[26]P.L. 94-571, 94th Cong., 2d Sess. (Oct. 20, 1976), §7(g), 90 Stat. 2706.

tax purposes are notoriously variable. In that connection, the United States Tax Court has recently held that an employee of the IDB – a citizen of Chile and a holder of a G-4 visa, who had resided in the United States since 1966 – was a resident alien for tax purposes and therefore entitled to file a joint income tax return with his wife claiming their children and his wife's mother as dependents. *Escobar v. Commissioner*, 68 T.C. 304 (1977). The Tax Court there noted that, even assuming that the stay of G-4 visaholders in the United States was limited by the immigration laws to a definite period, those aliens could nevertheless be residents of the United States for income tax purposes. See also *Brittingham v. Commissioner*, 66 T.C. 373, 414 (1976), stating that "the immigration status of an alien does not conclusively determine whether [he] is a resident of the United States."

Furthermore, the Revenue Ruling relied, as does the petitioner, on *Seren v. Douglas, supra*, a case that does not support their position regarding G-4 aliens. That case involved a foreign student holding a non-immigrant F-1 visa, which classified him as an alien with "a residence in a foreign country which he has no intention of abandoning . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . . ." The court held that he was precluded from establishing state domicile so as to qualify for in-state rates at a state university, since the terms of his visa "bound him to not abandon his homeland." 489 P.2d at 603 [27]. The court also

[27]The passage which the petitioner has quoted from *Nyquist v. Mauclet, supra*, 53 L.Ed.2d at 68 (Pet. Br. 38), makes a similar point about F-1 visaholders, but likewise says nothing about G-4 visaholders.



recognized, however, that "that disability could, as a matter of fact and law, have dissolved upon expiration of his student visa . . . . [at which] time he could abandon his legal intent to return to his homeland . . . ." *Id.* A G-4 visaholder, of course, is not bound by the terms of his visa "to not abandon his homeland," and hence the *Seren* decision does not support the conclusion that a G-4 alien cannot establish domicile in this country.

In short, as the district court found, there is nothing in the law of domicile or in the federal immigration laws which requires the conclusion that the holding of a G-4 visa either explicitly or implicitly erects any barrier to the establishment of a domicile in Maryland. To the contrary, a G-4 visaholder may in fact have the requisite domiciliary intent. Thus, the University's irrebuttable presumption of non-domicile for such visaholders is not necessarily or universally true in fact. Under *Vlandis*, therefore, since the University purports to be concerned with domicile in its admission policy and in allocating rates for its tuition and fees, the presumption concluding the inquiry into that crucial factor for G-4 aliens denies them due process of law.

### B. The Due Process Principle Applied in *Vlandis v. Kline* Has Been and Should Continue To Be Preserved as Applicable to Cases Like *Vlandis* and the Present Case.

The petitioner and the *amici curiae* supporting him argue that *Vlandis* has been so eroded by subsequent decisions of this Court that it should be overruled. It is true that a broad reading and application of the

rationale in *Vlandis* – which, as the petitioner (Pet. Br. 21) and *amici* (Am. Br. 5) state, some lower courts had adopted after the *Vlandis* decision – were cut back by subsequent decisions of this Court and were criticized by some academic commentators. But we need not and do not advocate such a broad reading here. As discussed above, this case is virtually identical to *Vlandis.* And this Court, lower courts, and commentators have recognized that the *Vlandis* doctrine, as limited in accordance with subsequent decisions to its core due process principle and as applied to cases with facts like those in *Vlandis* and the present case, falls plainly within the scope of procedural due process.

As we shall show, this Court's decisions and sound constitutional principles reveal that the due process rationale of *Vlandis* has and should have continued vitality when applied as follows: Where the State, through a statute or administrative rule, makes a certain fact crucial to the entitlement to or enjoyment of property or liberty, it may not preclude individuals who seek to meet that factual test, and who are not in a class universally unable to do so, from proving that they do meet that test, unless the difficulties in determining the crucial fact through such an individualized hearing procedure would outweigh the individuals' interests affected. We now discuss the precedential and constitutional underpinnings of this principle and its application here.



**1. Where the State Makes a Particular Fact Crucial, Its Use of a Conclusive Presumption To Deny to a Certain Class of People the Opportunity to Prove That Fact Denies Procedural Due Process Unless That Presumption Is Universally True or Unless the State's Difficulties in Holding Individual Hearings Outweigh the Individual Interests Affected.**

In *Weinberger v. Salfi,* 422 U.S. 749 (1975), this Court, speaking through Mr. Justice Rehnquist, upheld the provision of the Social Security Act which defines "widow" and "child" so as to exclude surviving wives and stepchildren from survivors benefits when those wives and stepchildren had their respective relationships to a deceased wage earner for less than nine months prior to his death. The Court distinguished, but did not overrule, *Vlandis* as follows:[28]

> "In *Vlandis v. Kline,* a statutory definition of 'residents' for purposes of fixing tuition to be paid by students in a state university system was held invalid. *The Court held that where Connecticut*

[28]The Court in *Salfi* also distinguished and preserved two other cases holding irrebuttable presumptions unconstitutional – *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). The Court stated that, unlike the claims involved in those cases, a non-contractual claim to receive funds from the federal treasury enjoys no constitutionally protected status, although, of course, there may not be invidious discrimination among such claims. 422 U.S. at 771-72. Subsequent to *Salfi*, this Court again reaffirmed *La Fleur* by striking down an irrebuttable presumption "virtually identical" to that held invalid in *La Fleur. Turner v. Dept. of Employment Security*, 423 U.S. 44, 46 (1975). In the present case, as we have shown, the University's conclusive presumption is "virtually identical" to that struck down in *Vlandis.*

*purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue.*

* * *

"Unlike the statutory scheme in *Vlandis* . . . , *the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible.* . . . [T]he benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. . . . [A]ppellees are completely free to present evidence that they meet the specified requirements . . . ." 422 U.S. at 771, 772 (emphasis added).[29]

[29]In making the last two statements, the Court analogized the case before it to *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). As discussed above, the lower court in that case had upheld the validity of a state university's one-year residency requirement for in-state status, which students could meet while in student status and after which time the students could present evidence of in-state residence. As the Court in *Salfi* recognized, that policy made the in-state rates available upon compliance with an objective criterion, evidence of which the students were free to present, rather than making the in-state rates available upon compliance with a certain factual test (residency) and then precluding certain students from presenting, and having considered, evidence that they met that test. Moreover, as shown on pp. 20-21 above, the regulation in *Starns* allowed students to meet the one-year residency requirement while in student status, whereas the statute in *Vlandis* prohibited the students involved from ever rebutting the presumption of non-residence during the entire time they remained in student status. The University's policy here likewise prohibits G-4 aliens from ever rebutting the presumption of non-domicile during the entire time they remain in G-4 status.



The Court thus made clear the distinction between statutes that condition benefits upon compliance with an objective criterion on which individuals can present evidence, and statutes that condition benefits upon a factual test that is deemed to be crucial – such as residency in *Vlandis*, fitness as a parent in *Stanley v. Illinois*, 405 U.S. 645 (1972), and fault in driving in *Bell v. Burson*, 402 U.S. 535 (1971) – and then preclude individuals from presenting relevant evidence that they meet that test and having that evidence considered.

The Court had suggested the same distinction in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), cited by the Court in *Salfi*. See 422 U.S. at 774. That case involved a regulation that required certain disclosures whenever credit was offered to a consumer " 'for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments.' " 411 U.S. at 362. That regulation was attacked under the Due Process Clause as constituting a conclusive presumption that payments made under an agreement providing for more than four installments necessarily included a finance charge, when that might not in fact be true. The Court rejected that attack stating:

> "The challenged rule contains no [conclusive] presumption. The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class." *Id.* at 377.

As thus drawn by the Court, the line of distinction resembles closely the traditional line which marks off, on the one side, departures from procedural due process and, on the other side, the now judicially discredited challenges to legislative or administrative choices which before 1937 often had prevailed under the guise of substantive due process. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). Mr. Justice Rehnquist's language in dissent in *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 524 (1973), points up the constitutional difference between irrebuttable presumptions which impinge upon procedural due process and valid legislative limitations operating for the protection of the public in areas of economic regulation:

> "There is a qualitative difference between, on the one hand, holding unconstitutional on procedural due process grounds presumptions which conclude factual inquiries without a hearing on such questions as fault, *Bell v. Burson*, 402 U.S. 535 (1971), the fitness of an unwed father to be a parent, *Stanley v. Illinois*, 405 U.S. 645 (1972), or, accepting the majority's characterization in *Vlandis v. Kline*, 412 U.S. 441 (1973), residency, and, on the other hand, holding unconstitutional a duly enacted prophylactic limitation on the dispensation of funds which is designed to cure systemic abuses."

As these authorities make clear, an enactment that constitutes a conclusive presumption for due process purposes is one that purports to be concerned with a particular fact and makes benefits or detriments turn on that fact and then concludes the inquiry into that fact for a certain class of people by erecting a presumption



that they cannot meet that factual test and denying them any opportunity to show the contrary. Such a conclusive presumption implicates compelling considerations of fairness and procedural due process.

Of course, as *Salfi* indicates, it must be clear, before such an irrebuttable presumption is found, that the legislature has not simply adopted an objective prophylactic limitation on the dispensation of funds, but that the legislative concern is really with a certain fact and that it presumes that ultimate fact from the proximate fact, itself irrelevant to the legislative concern, that a person is in a particular class. This determination is normally made by looking at the language of the challenged enactment itself. Thus, in *Vlandis*, the statute itself made entitlement to the lower tuition and fee rates turn on whether the person was a Connecticut resident or nonresident, but it then conclusively presumed that all persons who had a legal address outside of Connecticut when they applied to the University were nonresidents. The same was true in *Bell v. Burson, supra*, which held that a statutory requirement that an uninsured motorist who was involved in an accident and could not post adequate security must have his driver's license suspended without a hearing on the question of fault was an unconstitutional irrebuttable presumption. That decision was based on the fact that the statutory scheme itself made clear that the State deemed fault a crucial factor in the deprivation of drivers' licenses. See 402 U.S. at 541.

In other cases, even where the existence of a conclusive presumption is not clear from the face of the enactment, it may be otherwise manifest and indisput-

able – *e.g.*, from the legislative history or the briefs in the case – that the enactment does constitute such a presumption. In *Stanley*, for example, the Court found a conclusive presumption both by looking generally at the statute and because the State itself defended the statute as a procedural device whereby "all . . . unmarried fathers can reasonably be presumed to be unqualified to raise their children." 405 U.S. at 653.[30]

Generally speaking, however, application of the *Vlandis* doctrine does not mean that courts should go searching for a presumption behind the language of every legislative enactment. In the words of the Court in *Salfi*, "[t]his would represent a degree of judicial involvement in the legislative function which we have eschewed except in the most unusual circumstances" and would turn the irrebuttable presumption doctrine into a "virtual engine of destruction for countless legislative judgments . . . ." 422 U.S. at 773, 772. Indeed, it would be difficult for a court to determine, unless the enactment so provides or unless it is otherwise obvious, whether there is behind the enactment an ultimate fact that the State deems crucial and, if so, what that fact is. This is demonstrated, for instance, by mandatory retirement statutes, such as that upheld in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). A requirement that a person retire at a particular age is not necessarily a conclusive presumption of unfitness for work at that age. It might also be based on a purpose to remove persons from work in the least humiliating and embarrassing way, on

[30]See also *Cleveland Board of Education v. La Fleur, supra*, 414 U.S. at 643-46.



the need to boost the morale of younger workers, or on the need to artificially reduce the work force to make room for other individuals.[31] Likewise, in *Salfi*, the

[31]Professor Jonathan B. Chase of the University of Colorado discusses this point in an article which, as noted on p. 65 below, supports the use of the irrebuttable presumption doctrine in carefully circumscribed circumstances:

> "Could it not be argued successfully that the purpose [of a mandatory retirement statute] is not only to remove from the work force persons who are no longer able to perform, but also to do so in a way least likely to cause offense, embarassment or humiliation? That is, the purpose, in part, is to avoid the pain of individualized determinations of incapacity. Such a purpose would avoid irrebuttable presumption analysis since it does not presume anything other than the fact that the negative psychological impact on persons found by means of individualized determinations to be too old to continue in employment outweighs any benefit to be enjoyed by those individuals still capable of continuing in employment beyond a particular age, assuming that the age chosen is rational. The only overclassification present in such a determination is that there are some people on whom such a finding of incapacity would have no negative psychological impact. It is, however, extremely unlikely that any hearing could be devised which would accurately disclose who such persons were.
>
> "Another possible purpose for a mandatory retirement age has nothing whatever to do with ability to work but relates solely to the need to artificially reduce the work force. Given the fact that there are more people than jobs, it would be arguably rational for the state to artificially decrease the work force and, at the same time, open up more jobs by removing from the job market all persons beyond a particular age. Again, such a purpose presumes nothing, it denies no one a hearing on any fact the legislature has made ultimate. It is thus suggested that the 'new' procedural due process analysis does not necessarily mandate the result forebodingly foreseen by Justice Rehnquist in *La Fleur* [414 U.S. at 659]." *The Premature Demise of Irrebuttable Presumptions*, 47 Colo. L. Rev. 653, 691-92 (1976).

duration-of-relationship rule was not necessarily based on a conclusive presumption regarding sham marriages and on a desire to bar claims arising from them. As the Court recognized, that rule also protected "large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages." 422 U.S. at 782. Further, the very existence of the rule could reasonably have been expected to discourage sham marriages. *Id.* at 784-85. Finally, the rule could have served the interest in providing benefits only for persons who are likely to have become dependent upon the wage earner. See *id.* at 776 n. 11. Because of the dangers inherent in such speculation as to the purposes of or motives for an enactment and the consequent risk of undue judicial interference in legislative affairs, a conclusive presumption, where not apparent on the face of an enactment, should not easily be found.

These considerations, however, do not apply where a conclusive presumption is clear on the face of the challenged enactment or is otherwise obvious and not reasonably in doubt. That is the situation in the present case. A look at the University's policy for classifying students as "in-state" or "out-of-state" for purposes of admission, tuition, and fees reveals that the crucial fact is whether the student, or his parent if he is financially dependent, is domiciled in Maryland; and it shows that G-4s and other non-immigrant aliens are totally and uniquely precluded from proving that they meet that test. Moreover, the petitioner himself has repeatedly taken the position that the University "bases its award of in-state status on domicile" (Pet. Br. 11) and that G-4s and other non-immigrant visaholders are denied



that status because they are conclusively presumed to be unable to "have the requisite legal intent to establish Maryland domicile" (*id.*). This position is repeated at Pet. Br. 12, 34, and 35. The District Court, too, found that domicile was the crucial fact under the University's policy (Pet. App. 32a, 41a). Thus, there can be no doubt that the University's policy constitutes a conclusive presumption of the ultimate fact of concern – domicile – from the separate fact that a person is in a certain class – that of non-immigrant aliens.

Such a conclusive presumption, of course, could be justified if it were universally true in fact. As we have shown, however, the University's conclusive presumption of non-domicile is not universally true in fact for G-4 aliens. In such a case, the State's use of the irrebuttable presumption to conclude the inquiry into the fact that the State has made crucial – rather than providing individuals seeking to prove that fact with a hearing at which they could attempt to do so – creates a serious problem of procedural due process.[32] It

[32]The petitioner argues that the respondents have not demonstrated the requisite "property" or "liberty" interests to invoke the Due Process Clause (Pet. Br. 26-27 n. 14). With respect to property, he relies on this Court's decisions that property interests are created and defined by reference to state law, *Bishop v. Wood*, 426 U.S. 341 (1976), *Board of Regents v. Roth*, 408 U.S. 564 (1972), and on the fact that the University's policy here expressly precludes non-immigrants from obtaining in-state status. His argument is wholly without merit. The "property" interests needed to invoke the due process guarantee include the concept of "entitlements," representing expectation of interests to which persons have a claim under the enactments involved and which may not be revoked or withheld without complying with procedural due process. Thus, even where

*[continued]*

*(footnote continued from preceding page)*
government has no obligation to extend benefits, this Court has held that, where it has done so, it must observe due process restraints before terminating those benefits, as in *Goldberg v Kelly*, 397 U.S. 254 (1970), *Bell v. Burson*, 402 U.S. 535 (1971), and *Goss v. Lopez*, 419 U.S. 565 (1975), and in conditioning eligibility for those benefits, as in *Vlandis v. Kline*, *supra*, *United States Department of Agriculture v. Murry*, *supra*, and *Jimenez v. Weinberger*, 417 U.S. 628 (1974); see also *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). While this Court has indicated that such entitlements are defined by reference to state law, that does not mean that state enactments denying or withholding benefits from particular claimants must necessarily be read as precluding those claimants from having "property" interests for due process purposes. The enactments in all the irrebuttable presumption cases were of this type. Yet it is the very point of the irrebuttable presumption analysis that the State has determined that all those who meet a particular factual test are entitled to benefits, and then denies to a class of people who are not universally unable in fact to meet that test the opportunity to prove that they do so. In such a case, the State has itself created an entitlement to the benefits for those who can show the ultimate fact and it has then deprived certain people of that entitlement. This situation is similar to that in *Arnett v. Kennedy*, 416 U.S. 134 (1974). There the Court held that an employee who had a statutory right not to be discharged without cause had a property right for due process purposes, even though the same statute also expressly permitted his discharge without the procedures he claimed were constitutionally required. So too here, all persons who can show the fact deemed crucial under the State's enactment have an entitlement to benefits and thus a property interest, even though the same enactment also expressly prevents certain people who could prove that fact from having the opportunity to do so. Thus, in the present case, as in *Vlandis*, the respondents, if able to show Maryland domicile, have a property right in the form of an entitlement to in-state status.

The petitioner's reliance on *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260 n. 15 (1974), for the proposition that the respondents have no "liberty" interest is also misplaced.

*(continued)*



requires the reviewing court to scrutinize carefully the State's interest in using an irrebuttable presumption instead of making individual determinations of the crucial fact, and to weigh that interest against the individuals' interests burdened by the presumption.

Where the individual has an important, even if not constitutionally protected, interest, and the State would not have great difficulty in determining the crucial fact through an individualized hearing procedure, the presumption cannot stand. Mr. Justice Marshall made this point clearly in his concurring opinion in *United States Dept. of Agriculture v. Murry*, *supra*, 413 U.S. at 518:

> "[W]here the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices."

Thus, for example, in *Vlandis* the private interest burdened by the irrebuttable presumption was the interest in securing a public education – an interest which, while not a constitutional right, has nonetheless

*(footnote continued from preceding page)*
The Court there was discussing whether a *one-year durational* residency requirement for in-state status penalized the *right to travel* for purposes of determining the proper *equal protection* test. That discussion is not relevant to our position that a *permanent irrebuttable presumption* of non-domicile for determining in-state admission and tuition status burdens, for *due process* purposes, the "liberty" interest which those who may be domiciled in State but are not allowed to show it have in securing a public higher education in their home State.

been recognized by this Court as of extreme and vital importance in our society. See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 29-30 (1973); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). And, as the *Vlandis* Court recognized, the State would not have had substantial difficulties in holding individualized hearings to determine the bona fide residence of students who had applied from out of State. 412 U.S. at 453-54. Similarly, in *Stanley*, the Court contrasted the "important interests of both parent and child" which were involved, with the fact that "the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal." 405 U.S. at 657.[33]

On the other hand, where purely economic matters are at stake and where the State would have substantial difficulties in determining the ultimate fact through individualized hearings, conclusive presumptions are justifiable. The State's difficulties could arise either from the large number of individualized hearings that would be required or from the lack of any alternative means that is clearly better than the conclusive presumption for determining the ultimate fact. For example, in cases challenging some part of a major social welfare or governmental insurance program, such

[33]See also *Bell v. Burson*, *supra*, 402 U.S. at 540 ("Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement"); *United States Dept. of Agriculture v. Murry*, *supra*, 413 U.S. at 517 n. 2 ("The Congress has alternate means available to it by which its purpose can be achieved"); *Cleveland Board of Education v. La Fleur*, *supra*, 414 U.S. at 647 n. 14 ("The school boards have available to them reasonable alternative methods of keeping physically unfit teachers out of the classroom").



as the Social Security System, the administrative burdens that would be created by a requirement to grant individualized hearings to all claimants would in most instances be intolerable and justify the use of a broad conclusive presumption to limit the dispensation of funds. Thus, in *Salfi*, the Court relied in part on the "large numbers" of people involved – the "millions of beneficiaries" – and the consequent "administrative difficulties of individual eligibility determinations." 422 U.S. at 781, 784. See also *Califano v. Jobst*, 46 U.S.L.W. 4004, 4006 (Nov. 8, 1977). The potentially overwhelming administrative burden that would otherwise result should also justify age requirements for drinking, voting, driving, etc., even if such requirements were thought to embody conclusive presumptions. Furthermore, the use of an irrebuttable presumption may be justified if there is no other readily available and more reliable way, or no recognizable standards, to measure the ultimate fact. Again in *Salfi*, the Court stated:

> "Nor is it at all clear that individual determinations could effectively filter out sham arrangements, since neither marital intent, life expectancy, nor knowledge of terminal illness has been shown . . . to be reliably determinable." 422 U.S. at 782-83.

When the conclusive presumption cannot be justified by such administrative necessities outweighing the individuals' interests, the State's use of the conclusive presumption is wholly unfair, and a procedure for individualized determinations of the fact deemed crucial is required by the Due Process Clause. In the present case, the University's conclusive presumption of non-

domicile for G-4 aliens cannot be so justified. As in *Vlandis*, that policy burdens the G-4 students' interest in securing a public education -- an interest of vital societal importance.[34] By contrast, the University's difficulties in making individual determinations of whether G-4 aliens are in fact domiciled in Maryland are minimal. As discussed on pp. 25-27, *supra*, the University already has a hearing procedure for determining in-state status. It uses that procedure to inquire into the domicile of citizens and immigrant aliens. Indeed, it also uses the same procedures in the cases of G-4 and other non-immigrant aliens to consider such matters as changes in immigration status, but not domicile (Pet. Br. 32). It would take little, if any, extra time for the University also to consider domicile for G-4 and similarly situated non-immigrant aliens. As we have stated, there would appear to be relatively few such aliens with G-4 visas or other visas which would allow establishment of Maryland domicile. And, of course, as the Court recognized in *Vlandis*, 412 U.S. at 454, there is a more reliable way than a conclusive presumption, and there are recognizable standards, for determining domicile – namely, through examination of the factors that the University now examines for citizens and immigrant aliens. In short, we submit that in none of the other cases we have discussed was it so easy to make individualized determinations of the fact deemed

[34] As discussed in Part II of this Brief, the University's policy also creates a classification based on alienage and thus, for equal protection purposes, is subject to "strict scrutiny" regardless of the importance of the individuals' interest at stake. For equal protection analysis, then, the balancing test discussed here would not be necessary.



crucial as it is here.[35] In these circumstances, the Due Process Clause clearly requires the making of such individual determinations rather than the use of the unfair conclusive presumption.

**2. Application of the *Vlandis* Doctrine Under the Above Analysis Is Consistent with the Decisions Cited by Petitioner.**

This Court's decisions cited by the petitioner (Pet. Br. 23-25) and his supporting amici (Am. Br. 6) are wholly consistent with the analysis we have suggested for applying the due process principles of *Vlandis*.

In *Salfi* itself, as we have discussed, the Court pointed out that the challenged statute did not constitute an irrebuttable presumption at all, but established a flat objective criterion on which individuals could present evidence. Even if that statute could be said, by virtue of the main purpose expressed in its legislative history, to embody a conclusive presumption, it would nonetheless be justified, as also discussed above, on the grounds that it regulated only economic interests and that requiring individualized hearings would create an overwhelming administrative burden and would not even be a clearly more reliable way to determine the fact of concern.

In *Murgia*, the mandatory retirement statute involved – requiring that police officers retire at the age of 50 – was a flat objective requirement, for which several

[35] Apart from the alleged administrative difficulties, the other interests asserted by the petitioner to support the University's policy are shown on pp. 22-29, *supra*, to be insufficient to do so.

reasons were possible (see pp. 48-49, *supra*), rather than an irrebuttable presumption purporting to be concerned with a particular fact and then concluding the inquiry into that fact. Understandably, then, this Court did not make an irrebuttable presumption analysis, but employed traditional equal protection principles.

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976), the challenged federal statute prescribed two methods for showing "total disability" from black lung disease – for which compensation was provided. The first defined "totally disabled." The second provided that if a miner had complicated and incurable black lung disease, he was deemed to be totally disabled for purposes of entitlement to compensation. The lower court had held the latter to be an unconstitutional irrebuttable presumption, and this Court reversed. As this Court pointed out, while the challenged provision was in the form of an irrebuttable presumption, it was not an irrebuttable presumption in the mold of those in *Vlandis* and *Stanley*. Id. at 22. In those cases, as discussed above, the legislature's concern was with a particular ultimate fact and it then presumed that fact from the proximate fact, itself irrelevant to the legislative concern, that a person was in a certain class or had a certain trait. The provision involved in *Usery* was of a different type, for the Congress was not only concerned with the ultimate fact presumed – total disability from black lung disease – but was equally concerned with the proximate fact or trait – complicated and incurable black lung disease. As the Court stated, the effect of the challenged provision was to provide compensation for complicated black lung disease, and "it was precisely this advanced and



progressive stage of the disease that Congress sought most certainly to compensate." *Id.* at 23. The provision in *Usery*, then, did not involve a conclusive presumption that implicated procedural due process. In any event, the Court limited its holding to enactments "regulating purely economic matters," *id.* at 24; and in such cases, as we have shown, weighing the individuals' interests against the State's difficulties in holding individualized hearings will very often result in a finding that the conclusive presumption is justified.

In *Knebel v. Hein*, 429 U.S. 288 (1977), the challenged federal food stamp regulations provided that a travel allowance in connection with job training would be included in income for food stamp purposes. The lower court had gone behind the face of the regulations and had found that they reflected a conclusive presumption that receipt of the travel allowance increased the trainee's food purchasing power and decreased her need. 402 F. Supp. 398, 407 (S.D. Iowa 1975). This Court rightly refused to engage in such a search for irrebuttable presumptions. It held:

> "Nor do the regulations embody any conclusive presumption. They merely represent two reasonable judgments: First, that recipients of state travel allowances should be treated like other trainees and like wage earners; and second, that the standard 10% deduction, coupled with the 30% ceiling on coupon purchase prices, provides an acceptable mechanism for dealing with ordinary expenses such as commuting." 429 U.S. at 297.

Similarly, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the challenged sections of the federal immigration laws did not constitute a conclusive presumption purporting to be concerned with a particular factual question and

then concluding the inquiry into that fact. Rather, they simply excluded the relationship between an illegitimate child and his natural father from the special immigration status accorded children or parents of American citizens or permanent resident aliens. In any event, the Court based its decision to uphold those sections on the Congress' traditional plenary power over immigration, which is "largely immune from judicial control." 430 U.S. at 792.

Again, in *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of subst. federal question*, 430 U.S. 961 (1977), the challenged enactment, which prohibited voting by aliens in school elections, was a flat, objective prohibition, not a conclusive presumption. As the court explained:

> "The statutes do not create an irrebuttable presumption. There is no fact presumed from the status of alienage; rather the legislature intended to prohibit aliens from voting, and the classification exactly achieves that purpose. The statutes do not purport to be concerned with prohibiting from voting persons with some common trait, which trait is conclusively presumed from the status of alienage. Instead the statutes only purport to exclude aliens from voting. Thus, they do not create a conclusive presumption." 553 P.2d at 833.[36]

[36] The other lower court decisions cited by the petitioner (Pet. Br. 25 n. 12) likewise involved flat, objective requirements, rather than irrebuttable presumptions of the type involved in *Vlandis*. Thus, in *Mogle v. Siever County School Dist.*, 540 F.2d 478, 484-85 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), in upholding a residency requirement for teachers, the court explained:

> "In [*Vlandis*], in effect, a fact question was identified
>
> *(continued)*



Finally, in *Califano v. Jobst*, 46 U.S.L.W. 4004, 4006 (Nov. 8, 1977), this Court indicated that there is no question about the power of Congress to condition social security benefits on simple criteria such as age and marital status. While the Court indicated that such criteria were premised on a congressional assumption about probable dependency, we do not read the Court's statement to mean that the flat social security eligibility criteria of age and marital status constitute irrebuttable presumptions of the *Vlandis* type. Even if they did, however, such criteria would nonetheless be justified under a balancing of competing interests. As the Court stated, "[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency . . . ." *Id.*

*(footnote continued from preceding page)*

and then decided by a conclusive presumption. . . .

> "In our case, the residency requirement does not involve such identification of a controlling fact question and decision of it by an irrebuttable presumption. There are numerous factors that may undergird the policy and the line drawn by the Board. It is not shown that application of the policy to this plaintiff involves a presumption against him on any particular point. In such a case, we do not feel the conclusive presumption doctrine was intended to apply."

The same was true of the prison policy in *Sellers v. Ciccone*, 530 F.2d 199 (8th Cir. 1976), which required long-term inmates to be within ten years of a release date in order to be eligible for a certain training program, and of the social security provision in *Fisher v. Secretary of HEW*, 522 F.2d 493 (7th Cir. 1975), which conditioned benefits for domestic workers on their having minimum earnings from a single employer for a certain number of quarters.

### 3. Application of the *Vlandis* Doctrine Under the Above Analysis Is a Principled Constitutional Interpretation.

While the above decisions admittedly put limits on the irrebuttable presumption doctrine of *Vlandis*, they are wholly consistent with the analysis we have suggested for applying that doctrine. That analysis, we submit, represents the proper interpretation of the Due Process Clause. Where the State makes clear its concern with a particular fact and makes that fact crucial to the entitlement to property or enjoyment of liberty, its denial to a certain class of people of the opportunity to prove that they meet that factual test, on the basis of a conclusive presumption that is not universally true in fact, is plainly unfair and implicates established and fundamental procedural due process concerns. Of course, as discussed above, there are sound policy and constitutional reasons not to search for such conclusive presumptions in all legislative enactments by looking behind the language of the enactments to the possible purposes for them. To do so would constitute undue judicial intervention into the legislative function and would, in the language of *Salfi*, turn the irrebuttable presumption doctrine into "a virtual engine of destruction for countless legislative judgments . . . ." 422 U.S. at 772. But where it is clear from the face of the enactment or is otherwise obvious that the enactment has made a certain fact crucial and then has conclusively presumed the existence of that fact from another fact, which is not otherwise the subject of the legislative concern, then principles of procedural due process require a careful scrutiny of the enactment. Such a conclusive presumption can be justified only if



the State's difficulties in determining the crucial fact through individualized hearings would be substantial and would outweigh the individuals' interests affected. Otherwise, the denial of an individualized hearing on the fact deemed crucial is a denial of due process.

This analysis is not a resurrection of the substantive due process concepts of the early part of this century, which have been in large part repudiated by this Court. For as the Court recognized in *Stanley v. Illinois*, 405 U.S. at 652, our analysis scrutinizes means, not ends. It does not in any way prohibit or limit the State's ability to pursue certain stated objectives. Rather, it simply focuses on the means the State uses to achieve its objective and ensures that when the State conditions benefits or detriments on a particular fact, it does not without very good reason deny people's right to introduce, and to have duly considered, relevant evidence regarding that fact.

Various members of this Court have, at one time or another, recognized the basic due process principle inherent in the above analysis, although they would give that principle varying degrees of breadth in application. See, *e.g.*, Mr. Justice Brennan's dissenting opinion, joined by Mr. Justice Marshall, in *Salfi*, 422 U.S. at 804-05; Mr. Justice Stewart's opinion for the Court in *Vlandis*, *supra*, joined by Justices Brennan, Marshall, Blackmun, and Powell, and Mr. Justice Stewart's concurring opinion in *Murry*, 413 U.S. at 516-17; Mr. Justice Marshall's concurring opinion in *Murry*, 413 U.S. at 518 (quoted on p. 53, *supra*); Mr. Justice White's opinion for the Court in *Stanley*, 405 U.S. at 656-57; and Mr. Justice Rehnquist's dissenting opinion, joined by the Chief Justice and Mr. Justice Powell, in

*Murry*, 413 U.S. at 524 (quoted on p. 46, *supra*).

Furthermore, legal scholars have recognized that, within limits such as we have suggested, the irrebuttable presumption doctrine of *Vlandis* is a principled and useful constitutional interpretation. Professor Laurence H. Tribe of Harvard, for example, has suggested such a limited application of the irrebuttable presumption doctrine to require individualized hearings in certain cases, calling that analysis "structural due process." See Tribe, *Structural Due Process*, 10 Harv. Civ. R. - Civ. Lib. L. Rev. 269 (1975). Among other things, Tribe made clear that:

> "If a certain fact, for example, unsuitability, has been made relevant, through statute or administrative rule, to the continued enjoyment of liberty or property, then the government's refusal to hear evidence on that fact – its insistence on making a factual finding without hearing from the person about whom the fact is found – is a denial of constitutional right." *Id.* at 287.

Bruce L. Ackerman has also suggested a conclusive presumption analysis much like the one we have suggested here. Ackerman, *The Conclusive Presumption Shuffle*, 125 U. Pa. L. Rev. 761 (1977).[37] He concludes

[37]Ackerman identifies two principles to limit the irrebuttable presumption doctrine to manageable proportions. The first is that the doctrine applies only to provisions which, in Ackerman's words, serve "procedural objectives" or constitute a "procedural short cut" – by which he means that the provisions are obviously procedural mechanisms for determining a fact ultimately deemed crucial, rather than themselves embodying substantive policy objectives. 125 U. Pa. L. Rev. at 780. The second limitation is based on the feasibility of individualized determinations as an alternative to the conclusive presumption,

*(continued)*



that such an analysis "provides a means for assuring some minimal level of procedural fairness." *Id.* at 808. Professor Jonathan B. Chase of Colorado, too, has suggested an irrebuttable presumption analysis similar to the one we have proposed, calling that analysis "valuable," "workable," and "principled." Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 Colo. L. Rev. 653, 705 (1976).[38]

In addition, the due process principle underlying our analysis has been recognized and applied by this Court in other areas of the law. For example, in administrative law, it is established that, even where an agency is not required to adopt a particular rule, once it does so it is bound by the Due Process Clause to follow that rule in a particular case. See, *e.g.*, *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260

*(footnote continued from preceding page)*

and recognizes that even the procedural conclusive presumption can be justified "when individual harm is slight and administrative burdens would seriously weaken the efficacy of a government program" (*id.* at 796) or where there are no recognizable standards for determining the ultimate fact question (*id.* at 793).

[38]See also the thoughtful concurring opinion of Judge William J. Campbell in *Miller v. Carter*, 547 F.2d 1314, 1327-29 (7th Cir. 1977), where he suggested an irrebuttable presumption analysis with limitations arising primarily from *Salfi*, which limitations are similar to those we have identified. And see *Hodges v. Weinberger*, 429 F. Supp. 756, 760 (D. Md. 1977), where, in an opinion for a three-judge court, Judge Miller, the same district judge who decided the present case, appears to have recognized the distinction between a flat eligibility requirement for social welfare benefits and a conclusive presumption relating to an evidentiary determination of an ultimate fact on which eligibility turns.

(1954). So too here, the legislature may not be required to condition benefits or detriments on the existence of the particular fact with which it is concerned – but may instead be able to fashion a broad, flat, objective eligibility requirement. But once the legislature has elected to make the grant of benefits or the imposition of detriments turn on a certain fact, it is bound by the Due Process Clause to ensure that that test is met in the individual case, unless the difficulties in doing so are so great as to outweigh the individuals' interests.[39]

Thus, the analysis suggested here for applying the irrebuttable presumption doctrine of *Vlandis* comports with recognized principles of procedural due process. Accordingly, we submit that *Vlandis* should not be overruled but should be preserved as applicable in the circumstances and under the analysis which we have suggested.

---

[39]A similar principle applies in the field of criminal law. A State is not constitutionally prohibited from changing its substantive criminal law to redefine the elements of a crime. Thus, for instance, a State may define as the crime of "felonious homicide" any intentional or reckless killing regardless of the degree of provocation. But if the state statute makes the absence of provocation an element of the crime, then it is prohibited by the Due Process Clause from placing the burden of showing provocation on the defendant, but must itself prove absence of provocation beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (distinguished, but preserved, in *Patterson v. New York*, 53 L.Ed.2d 281, 45 U.S.L.W. 4708 (June 17, 1977)). This holding demonstrates further that the fact that an enactment makes a particular fact crucial (there, to conviction for a certain crime; here, to entitlement to benefits), even if not required to do so, has important due process consequences.



**4. Application of the Above Analysis in the Present Case Shows That the University's Policy Denies Due Process.**

In applying the above analysis here, it is clear that the facts of the present case, like the facts in *Vlandis*, fall within the class of cases where an irrebuttable presumption denies due process of law. As we have shown, the University's policy plainly constitutes a conclusive presumption, for it makes Maryland domicile the crucial factor in determining in-state status and it then precludes all non-immigrant aliens from proving such domicile because they are presumed to lack the requisite intent to create such domicile. For G-4 visaholders this conclusive presumption is not universally true in fact. And the presumption cannot be justified through balancing the competing interests, since the G-4 visaholders have an important interest at stake, and since, in any event, the University can without much difficulty determine the domicile of such visaholders through individual hearings. Thus, the University's conclusive presumption of non-domicile for G-4 visaholders is fundamentally unfair to them and was properly held by the courts below to constitute a denial of procedural due process.

## II.

## THE UNIVERSITY'S POLICY BARRING G-4 VISAHOLDERS FROM THE OPPORTUNITY TO PROVE MARYLAND DOMICILE DISCRIMINATES AGAINST A CLASS OF ALIENS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The respondents argued below that the University's policy of flatly prohibiting G-4 visaholders from proving Maryland domicile denied them equal protection of the laws. While the courts below found it unnecessary to reach the question, the respondents reassert that argument in this Court as an alternative ground in support of the judgment in their favor. See *Hankerson v. North Carolina*, ____ U.S. ____, 53 L.Ed.2d 306, 314 n. 6 (1977), 45 U.S.L.W. 4707 (June 17, 1977).[40] Our argument here is significantly shorter in length than our due process analysis, since the argument here is less complex, the petitioner has not urged this Court to overrule any prior decision in this area, and we are able here to rely in certain respects on points already developed in the preceding section of this brief. But the equal protection violation shown here stands on its own feet, flows directly from a recent decision of this Court, *Nyquist v. Mauclet*, ____ U.S. ____, 53 L.Ed.2d 63, 45 U.S.L.W. 4655 (June 13, 1977), and provides an entirely adequate ground for affirming the judgment below.

[40] See note 1 on p. 2, *supra*.



### A. The University's Policy Creates a Classification Based on Alienage and Is Therefore Subject to Strict Scrutiny.

This Court has made clear that state classifications based on alienage are suspect classifications and are consequently subject to strict judicial scrutiny in determining whether they violate the Equal Protection Clause. Thus, in *Graham v. Richardson*, 403 U.S. 365 (1971), the Court struck down a state statute that conditioned welfare benefits to aliens, but not citizens, on a durational residency requirement. It stated that the classification was based on the suspect criterion of alienage and was "therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired." *Id.* at 376. This holding was reaffirmed in *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973), *In re Griffiths*, 413 U.S. 717, 721 (1973), and *Examining Board v. Flores de Otero*, 426 U.S. 572, 601-02 (1976). Under this standard, in order to justify the use of the classification,

> "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, *supra*, 413 U.S. at 721-22 (footnote omitted).

Essentially the same formulation was set out in *Sugarman*, 413 U.S. at 642, and in *Flores de Otero*, 426 U.S. at 605. If the state classification cannot withstand this strict scrutiny, it cannot stand.[41]

[41] As discussed above (pp. 22-23, *supra*), the Court in *Mathews v. Diaz*, 426 U.S. 67 (1976), applied much more relaxed scrutiny

*(continued)*

This Court's decision last Term in *Nyquist v. Mauclet, supra,* again reaffirmed that "classifications by a State that are based on alienage are 'inherently suspect and subject to close judicial scrutiny,'" 53 L.Ed.2d at 69; and it made clear that this principle applies even when the state enactment discriminates only against a certain class of aliens rather than against all aliens. *Nyquist* involved a provision of a New York statute which barred state financial assistance for higher education to aliens who had neither applied for United States citizenship nor submitted a statement of intent to do so. New York contended that the statute "should not be subjected to . . . strict scrutiny because it does not impose a classification based on alienage," but distinguishes "only within the 'heterogeneous class of aliens' and 'does not distinguish between citizens and aliens *vel non.*'" 53 L.Ed.2d at 70. This Court rejected that argument, pointing out that the statute "is directed at aliens and only aliens are harmed by it, . . . [and] the fact that the statute is not an absolute bar [against aliens generally] does not mean that it does not discriminate against the class." *Id.* As the Court also explained, the state statute struck down in *Graham v.*

---

*(footnote continued from preceding page)*
in upholding a federal statute that created a classification based on alienage. That statute granted Medicare benefits to citizens and resident aliens who met a durational residency requirement, but denied them to other aliens. As we have pointed out, however, and as this Court has itself recognized, the petitioner "can draw no solace from the case [*Mathews*] . . . , because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States. *Id.*, at 84-87." *Nyquist v. Mauclet, supra,* 53 L.Ed. 2d at 70 n. 8.



*Richardson, supra,* had likewise not prohibited *all* aliens from obtaining welfare benefits, but only those who did not meet a durational residency requirement.

*Nyquist* clearly governs this case. The University's policy barring G-4 (and other non-immigrant) aliens from ever proving Maryland domicile discriminates against that class of aliens by subjecting them to a restriction not faced by American citizens and immigrant aliens similarly situated.

The petitioner, however, attempts to avoid the controlling force of *Nyquist* by maintaining that the University's policy is not directed at and does not harm only aliens, but "is directed at and disadvantages only nondomiciliaries, a class which includes some United States citizens as well as some aliens" (Pet. Br. 30). The upshot of the petitioner's contention, then, is that the University's policy does not discriminate against non-immigrant aliens, but treats them just like other non-domiciliaries, including citizens and immigrant aliens.

This argument is plainly erroneous. Whether or not the University's policy constitutes an unconstitutional irrebuttable presumption of non-domicile for non-immigrant aliens, it clearly treats non-immigrant aliens differently from citizens and immigrant aliens for purposes of proving domicile. Citizens and immigrants are given the opportunity to show Maryland domicile and thus to obtain in-state status for admission, tuition, and fees. Non-immigrant aliens are not. The basis for the petitioner's argument that this is not a discrimination against the non-immigrant class of aliens, but only against non-domiciliaries, is that non-immigrant aliens as a class are in fact unable to be domiciled in Maryland.

We have answered this contention on pp. 29-41, *supra.* As we showed there, the University's assumption that all non-immigrant aliens are legally disabled from having the requisite intent to establish a Maryland domicile is not necessarily or universally true for the holders of G-4 visas and of the few other similar visa types that permit creation of an American domicile. Yet the G-4 and similar non-immigrant visaholders who are in fact Maryland domiciliaries are prevented by the University's policy from proving their domicile so as to obtain in-state status. No other Maryland domiciliaries must face such a restriction.

In short, the University's policy classifies between, on the one hand, citizens and immigrant aliens, who can prove Maryland domicile, and, on the other, the G-4 and other non-immigrant aliens for whom such domicile is also possible in fact, but who are denied the opportunity to prove it. As in *Nyquist,* this classification obviously is directed at and disadvantages *only* aliens (even though not all aliens), and it is therefore a suspect classification subject to strict scrutiny.

### B. The Interests Asserted in Support of the University's Policy Cannot Withstand a Strict Scrutiny Test.

In his brief in the Fourth Circuit (p. 32), the petitioner conceded that the interests purportedly underlying the University's policy "will not withstand a 'strict scrutiny' Equal Protection standard . . . ." He does not appear to have changed his position on this issue, for his brief in this Court asserts only that those



interests are "sufficient in light of the mere rational basis" which he says is the proper test (Pet. Br. 29). In any event, the petitioner was clearly correct in concluding that the asserted interests do not justify the University's policy under strict scrutiny.

The first interest asserted by the petitioner is the interest in limiting governmental expenditures to persons with a greater affinity to the United States. As stated above (p.22-23,*supra*), however, this Court specifically held in *Nyquist* that the "national affinity" interest "is not a permissible one for a State." 53 L.Ed.2d at 71. Moreover, the Court in *Nyquist* went on to find that, even if that were a valid interest, it was inadequate to support the State's discrimination against a class of aliens. *Id.* at 71-72. The "national affinity" interest likewise fails here.

As to the asserted interest in cost equalization based on past tax contributions, this Court explicitly held in *Shapiro v. Thompson,* 394 U.S. 618, 632-33 (1969), under a strict scrutiny analysis, that the Equal Protection Clause forbids the apportionment of state benefits according to the past tax contributions of its citizens. See also *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 266 (1974). Thus, the University's policy cannot be upheld as necessary to promote a substantial interest of the State in cost equalization. Indeed, as shown on pp. 23-24, *supra,* the policy is not even reasonably related to that objective.

The University's policy is also manifestly not necessary in order for a proper determination of domicile to be made. In order to determine whether the holder of a G-4 or similar visa is domiciled in Maryland, the University need only use the procedures it now uses

for American citizens and immigrant aliens. The possibility that this might increase the University's administrative burden to some extent cannot, for the reasons given on pp. 25-27, *supra*, justify its discrimination against the class of aliens involved here, particularly since any such increased burden would be so minor. See *Stanley v. Illinois*, *supra*, 405 U.S. at 658.

The final interest asserted by the petitioner – that the University's policy prevents disparate treatment among non-immigrant aliens – cannot be taken seriously in light of the fact, discussed above, that different categories of non-immigrant aliens are, under the federal immigration laws, differently situated with respect to their ability to show domicile in the United States. See pp. 27-29, *supra*.

Since the University's policy of flatly prohibiting G-4 visaholders from proving Maryland domicile thus cannot be justified under a strict scrutiny standard, that policy must be held to deny to such visaholders the equal protection of the laws guaranteed by the Fourteenth Amendment.[42]

---

[42]Even if that policy could be said not to trigger the strict scrutiny standard, it would still be void under the Equal Protection Clause as not rationally related to a legitimate state objective. See, *e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The "national affinity" interest, as we have said, has been held by this Court to be an impermissible one for a State. Moreover, the distinction which the policy draws between immigrant aliens and non-immigrant aliens is essentially arbitrary and without a rational basis as it affects holders of G-4 visas. As shown on pp. 29-41, *supra*, there is no relationship between, on the one hand, the holding of a G-4 rather than an immigrant visa and, on the other, an individual's intent to establish his domicile in Maryland. We have further demonstrated (pp. 23-24, *supra*)

*(continued)*



## III.

## THE UNIVERSITY'S POLICY VIOLATES THE SUPREMACY CLAUSE.

The decision below can also be supported on another ground raised by the respondents in the trial court though not reached by that court – namely, that the University's policy intrudes in areas reserved for federal regulation, in violation of the Supremacy Clause of the Constitution.

It is established that, under the Supremacy Clause, States may not encroach upon the exclusive federal power over, and policies involving, immigration and naturalization. *Graham v. Richardson*, *supra*, at 376-80, *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). The

---

*(footnote continued from preceding page)*

that there is no relationship between the holding of a G-4 rather than an immigrant visa and any alleged interest of the University in cost equalization based on tax contributions. Even if a G-4 employee of the IDB or the World Bank were able to change his visa status to that of an immigrant, the State still could not, because of international agreements and the federal statutes implementing such agreements, levy the state income tax on his income from the bank. Yet the University has admitted that, in such a case, it would allow the immigrant alien to show Maryland domicile, whereas it prohibits G-4 aliens from doing so, despite the fact that the two situations are the same so far as achieving or not achieving the purported purpose of cost equalization is concerned. Furthermore, for the reasons on pp. 24-27, *supra*, administrative convenience is not enough by itself, in the circumstances of the present case, to justify the policy even under the more relaxed standard. Finally, the asserted interest in preventing disparate treatment among non-immigrant aliens cannot support the policy when those aliens are in fact not similarly situated in terms of their ability to show American domicile.

University's policy at issue here imposes on G-4 and other non-immigrant visaholders restrictions not imposed on citizens and immigrant visaholders; it conditions the right of such non-immigrant aliens to show Maryland domicile on their changing their immigration status to that of permanent resident; and it thus provides a financial incentive for them to change their visa status. In these ways, the University has unlawfully intruded into the immigration field – an area occupied by the Federal Government because it is "one of the most important and delicate of all international relationships." *Hines v. Davidowitz, supra,* at 64. Such considerations, too, support an affirmance by this Court of the decision below.

## CONCLUSION

For these reasons, the respondents respectfully urge this Court to affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ALFRED L. SCANLAN
JAMES R. BIEKE
734 Fifteenth Street, N.W.
Washington, D.C. 20005
(737-1255)

*Attorneys for Respondents*

*Of Counsel:*

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

December 27, 1977

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

## REPLY BRIEF OF PETITIONER

FRANCIS B. BURCH,
Attorney General
of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
ROBERT A. ZARNOCH,
Assistant Attorney General,
1400 One South Calvert Building,
Baltimore, Maryland 21202,
Attorneys for Petitioner.

The Daily Record Co., Baltimore, Md. 21202

## TABLE OF CONTENTS



## TABLE OF CITATIONS

### *Cases*

***Statutes***



***Miscellaneous***



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

## REPLY BRIEF OF PETITIONER

### INTRODUCTION

The primary purpose of this Reply Brief of Petitioner is to expose as unsupported by decisions of this Court and as unsound in constitutional theory the irrebuttable presumption doctrine advanced by respondents. In a vain attempt to salvage a doctrine at its nadir if not already extinct, the international bank students have distorted the post-*Salfi* irrebuttable presumption cases of this Court to create a constitutional theory neither the trial nor appellate courts below would recognize. Moreover, the students have attempted to becloud the legitimate state interests justifying the in-state policy of

the University of Maryland and to magnify erroneously, virtually to the status of a fundamental right, the alleged individual interests of respondents affected by the challenged classification. Finally, the international bank students now seek to raise two additional issues ignored by both the district court and the court of appeals. Petitioner will respond to these contentions in turn.

## I.

### UNDER *SALFI* AND ITS PROGENY, THE CHALLENGED FEATURE OF THE UNIVERSITY'S IN-STATE POLICY NEED ONLY BE SUPPORTED BY A RATIONAL BASIS.

Respondents urge that the University's in-state policy for tuition and fee purposes, which excludes from the definition of domicile nonimmigrant aliens, must be gauged by a stricter judicial scrutiny than this Court traditionally has used in assessing the validity of economic regulation. This contention appears evident from their repeated reliance on *Stanley v. Illinois,* 405 U.S. 645 (1972) (Brief for Respondents at *passim*), which this Court has frequently noted involved a classification affecting a fundamental right (*see Weinberger v. Salfi,* 422 U.S. 749 (1975)); from their assertion that the students' "vital" right to secure a public education is at stake in this case and not merely a dollar differential (Brief for Respondents at 53-54 & 56), which "right" this Court found not to be "fundamental" in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973); and from their attempt to place economic regulation decisions of this Court in a different category than the present case. *See, e.g.,* Brief for Respondents at 59. It is clear, however, that no fundamental right or constitutionally protected interest is involved here and thus *Salfi* and subsequent cases mandate employment of the traditional "rational basis" standard of judicial review. *See* Brief of Petitioner at 18-33.



Respondents also contend for a new form of "strict judicial scrutiny" to be applied under the following circumstances:

> Where the State, through a statute or administrative rule, makes a certain fact crucial to the entitlement to or enjoyment of property or liberty, it may not preclude individuals who seek to meet that factual test, and who are not in a class universally unable to do so, from proving that they do meet that test, unless the difficulties in determining the crucial fact through such an individualized hearing procedure would outweigh the individuals' interests affected.

Brief for Respondents at 42.

Furthermore, under the theory now advanced by the international bank students:

> [It must be] clear from the face of the enactment or . . . otherwise obvious that the enactment has made a certain fact crucial and then has concluded the inquiry into that fact for a certain class of people.

*Id.* at 12.

This formulation which is not even hinted at in the lower court opinions is an obvious Frankenstein's monster, composed of isolated portions of this Court's post-*Salfi* irrebuttable presumption opinions. To accept the parts respondents have assembled, however, would be to reject the basic tenets of these cases.

For example, the international bank students urge that only facial or "otherwise obvious" irrebuttable presumptions be measured by their stricter standard of constitutional review. Brief for Respondents at 12. Yet in *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 24 (1976), this Court said that the mere fact that an enactment was phrased in terms of an irrebuttable presumption would not invalidate the statute "when its operation and effect are completely permissible." And

in *Califano v. Jobst*, ___ U.S. ___, 98 S. Ct. 95 (1977), and *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), this Court sustained what could only have been termed as "facial" or "otherwise obvious" irrebuttable presumptions.

*Salfi* and its progeny also obliterate the contention of the international bank students that enactments denying inquiry into a fact crucial to a benefit must be strictly scrutinized. In essence, their argument again challenges only the form of the enactment, a course rejected in *Usery v. Turner Elkhorn Mining Co., supra.* More importantly, respondents' proffered distinction between conditioning benefits on a "factual test" and an "objective criterion" (Brief for Respondents at 45) runs contrary to cases such as *Murgia* and *Jobst.*

In *Murgia* this Court noted that the challenged enactment sought to assure the physical preparedness of policemen by mandating retirement at age fifty. 427 U.S. at 314.[1] Obviously, the statute irrebuttably presumed that at age fifty a policeman was physically unfit to serve, a clearly factual question into which the officer was not permitted to inquire. Again in *Jobst,* the statute purported to be concerned with dependency, a factual test, but no individualized determination was held to be constitutionally required. These cases demonstrate that even if the University's definition of domicile is considered a factual test, it is free to irrebuttably exclude some from meeting that test if there exists a rational basis for doing so.

A further significant problem raised by respondents' interpretation of this Court's recent cases is that their construction of the theory of irrebuttable presumptions — objective form: valid; facial presumption of factual

[1] Contrary to the international bank students' assertions (Brief for Respondents at 48-49), Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), neither recited nor turned on the variety or rationales they have set forth.



matter: invalid — would enable a legislature with foresight to avoid all irrebuttable presumption arguments by eliminating any such form of the conclusive presumption from the face of a proposed statute by simply making the standard to be met into an objective form (although the presumption must underlie the statute for the legislation to make sense). By the interpretation given to the *Salfi* case by the international bank students, a statute so stated in the objective form should not be examined for the existence of a presumption behind the statutory language (Brief for Respondents at 48) since to do so "would represent a degree of judicial involvement in the legislative function which [the Court has] eschewed except in the most unusual circumstances." *Id., quoting with approval, Weinberger v. Salfi, supra* at 773. Hypothetically, then, where two statutes are challenged, each based on an identical conclusive presumption, one with that presumption on the face of the statute and the other with that presumption skillfully hidden by the mechanical form of an objective standard, a court may strike down the first, yet (under respondents' analysis of the recent cases) leave the second to continue in its operation of the conclusive presumption. Manifestly, it makes no sense to foster such a distinction.

The theory of irrebuttable presumptions urged by the international bank students also would require lower courts to balance individual interests against the administrative difficulties in providing individualized determinations. In cases like *Murgia* and *Jobst,* however, certainly no overt balancing was thought to be required by this Court. Indeed, it appears to be because the trial and appellate courts did engage in a balancing test in those cases that they were incorrectly decided below. Undoubtedly, there are few individuals in Jobst's situation and even this Court noted the "unusual hardship" the presumption imposed upon

him: yet the general rule was upheld. In *Murgia,* as here, there was an administrative device to inquire into factual matter which was irrebuttably presumed. (In *Murgia,* an annual physical exam; here, an appeals system). Nevertheless, under *Murgia,* a state is not constitutionally required to use that administrative device to make the crucial factual determinations.

Finally, the international bank students attempt to pigeonhole the irrebuttable presumption doctrine as *procedural* due process fails both in theory and practice.[2] To urge that a "liberty" interest sufficient to invoke procedural due process is at stake, respondents once again raise the fallacious notion (Brief for Respondents at 53) that some fundamental right to public education is involved in this case. *San Antonio Independent School District v. Rodriguez, supra. See also Memorial Hospital v. Maricopa County,* 415 U.S. 250, 260 n.15 (1974). And to find a "property" interest in the present case as urged by respondents would signal an abrupt and unwise retreat from this Court's recent decisions:

> "[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

[2] In Quilloin v. Walcott, ___ U.S. ___, 98 S. Ct. 549 (1978), this Court rejected a due process challenge argued on the basis of Stanley v. Illinois, 405 U.S. 645 (1972), a case on which respondents have placed major reliance. This Court in an unanimous opinion specifically noted that only the "substantive" rights of *Quilloin* were implicated under the due process clause and cited Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), also relied on by respondents, in the same breath.



*Bishop v. Wood,* 426 U.S. 341, 344 n.17 (1976), *quoting with approval, Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).

* * *

> "[A] person's interest in a benefit is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

*Id., quoting with approval, Perry v. Sindermann,* 408 U.S. 593, 601 (1972).

No state law, no rule, and no explicit understanding confers on the international bank students a property right in a preferential tuition rate.[3] On the contrary, they are clearly denied this right by the rule here in question. More importantly, as this Court's recent irrebuttable presumption cases make clear, when an enactment is challenged as creating an irrebuttable presumption, what is examined is whether the particular measure has a rational basis, the traditional *substantive* due process inquiry. *See Williamson v. Lee Optical Co.,* 346 U.S. 483, 488 (1955).

In summary, respondents advance a constitutional theory which is neither honest, consistent, nor workable.[4] It is a theory laden with unfettered judicial discretion, centering on determinations of whether a presumption is obvious or not, whether it involves a factual test or an objective criterion, and whether an interest in administrative convenience outweighs an

[3] Respondents' reliance on Arnett v. Kennedy, 416 U.S. 134 (1974), is misplaced, because there the employee had a *statutory* right not to be discharged without cause

[4] For example, on one hand the international bank students state that judges should not be permitted to search for an irrebuttable presumption behind the face of an enactment (Brief for Respondents at 48), and on the other hand ambiguously note that if the presumption is "otherwise obvious," a court should strike it down.

individual interest. It literally encourages trial judges to employ it as an "engine of destruction" for rational classifications and invites lower courts to turn the clock back to the judicial excesses and experimentation spawned by *Vlandis v. Kline*, 412 U.S. 441 (1973),[5] and away from the values of predictability and uniformity in constitutional adjudication which this Court's recent decisions have inspired. For these reasons, such a doctrine should be rejected.

## II.

### INTERESTS SERVED BY THE CHALLENGED FEATURE OF THE UNIVERSITY'S IN-STATE POLICY ARE RATIONALLY RELATED TO LEGITIMATE STATE GOALS.

In *Califano v. Jobst*, ___ U.S. ___, 98 S. Ct. 95, 100 (1977), this Court noted that under rational basis scrutiny a legislative or administrative classification "must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *See also Idaho Department of Employment v. Smith*, ___ U.S. ___, 98 S. Ct. 327 (1977).

[5] Relying upon Vlandis v. Kline, 412 U.S. 441 (1973), the international bank students attempt to attribute a "permanent" nature to the alleged presumption at issue in this case because the University's policy now prohibits them from ever rebutting the presumption of nondomicile "for as long as the G-4 visaholders remain in G-4 status" (Brief for Respondents at 10). This effort is a distortion of the critical footnote nine in the *Vlandis* opinion, 412 U.S. at 452 n.9, which distinguishes Starns v. Malkerson, 401 U.S. 985 (1971). What respondents try to obscure is that the alleged constitutional deprivation at stake in this case is not a change in immigration status but the denial of a particular benefit: *viz.*, preferential tuition rates and other fees. The "permanent" feature of the *Vlandis* presumption was that in-state tuition *benefits* were conditioned on a criterion which could *never* be met during the individual's status *as a student* — the critical period for which the benefits were sought. If, as the University has demonstrated (Brief of Petitioner at 27), the international bank students do have the opportunity to obtain these particular benefits while in student status, the alleged presumption of nondomicile is not permanent (and thus unconstitutional) even under *Vlandis*.



Focusing on characteristics of nonimmigrants and other nondomiciliaries, it is easy to see the reasonableness of the presumption said to be at issue here. Nonimmigrants are neither expected nor permitted to remain in this country indefinitely. As noted by Mr. Justice Rehnquist, dissenting in *Nyquist v. Mauclet*, 432 U.S. 1, 20 n.3 (1977), nonimmigrants "are also decisively disqualified by federal law from establishing a permanent residence in this country . . . ." *See* 8 U.S.C. § 1101(a)(20). This general characteristic of the class has been recognized by this Court, *Nyquist v. Mauclet, supra* at 4, and conceded by respondents ("[I]t seems probable that the great majority of non-immigrant alien students at the University of Maryland fall into visa categories which . . . may not permit the establishment of American domicile ). Brief for Respondents at 26. As a class they are not likely to have a close affinity to the State of Maryland.[6] As a class they are generally not in the

[6] Respondents have accused the University of resurrecting the "national affinity" interest rejected in Nyquist v. Mauclet, 432 U.S. 1 (1977). Unlike the statute challenged in *Mauclet*, the University of Maryland's in-state policy is not justified as offering an incentive for aliens to become naturalized. In this case, which does not involve a suspect alien/citizen classification (*see infra* at 12-15), the Chief Justice's dissent in *Mauclet* is particularly cogent:

> In my view, the Constitution of the United States allows States broad latitude in carrying out [economic incentive] programs. Where a *fundamental* personal interest is not at stake — and higher education is hardly that — the State must be free to exercise its largesse in any reasonable manner. New York, like most other States, does not have unlimited funds to provide its residents with higher education services; it is equally clear that the State has every interest in assuring that those to whom it gives special help in obtaining an education have or declare some attachment indicating their intent to remain within the State to practice their

country long enough to contribute much to the State's economy or they, like the international bank students here, are exempt by treaty from the requirements of state income taxation.[7] Over the long term, it is reasonable for the State to conclude that permanent resident aliens might contribute more to its economic well being than nonimmigrants or other nondomiciliaries, especially in light of the undeniable fact that an adjustment of immigration status to that of permanent resident alien is necessary for them to remain in this country indefinitely. Additionally, because the federal government can constitutionally deny economic benefits to nonimmigrants, *Mathews v. Diaz,* 426 U.S. 67 (1976), the States, if not permitted the same latitude via reasonable nondiscriminatory enactments, would be severly harmed by being forced to shoulder the shifted financial burden.

Finally, the administrative burden of making individualized determinations of domiciliary criteria for

special skills. It has no interest in providing these benefits to transients from another country who are not willing to become citizens. The line drawn by the State is not a perfect one — and few lines can be — but it does provide a rational means to further the State's legitimate objectives. Resident individuals who are citizens, or who declare themselves committed to the idea of becoming American citizens, are more liklely to remain in the State of New York after their graduation than are aliens whose ties to their country of origin are so strong that they decline to sever them in order to secure these valuable benefits.

432 U.S. at 14.

[7] The Internal Revenue Code, 26 U.S.C. § 893, *inter alia,* exempts salaries of international bank employees from federal income taxation. Section 894(a) exempts from tax income exempt under treaty. Section 894(b) further provides that for such income not connected with the conduct of a trade or business in the United States, "*a nonresident alien individual . . . shall be deemed not to have a permanent establishment in the United States at any time during the taxable year.*" (Emphasis added.)



nonimmigrants, although not staggering, is nevertheless quite substantial. More appeals, greater expense, additional personnel, and translators are virtually promised. No such burden is incurred when, as now, determinations for nonimmigrants are limited to questions of change of immigration status.[8]

The international bank students claim that if this administrative burden is balanced against their individual interests, the resulting constitutional equation is in their favor. Nothing could be further from the truth. A dollar differential, not a right to education, is at stake here, an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year. Certainly no claim can be made that professional employees of the World Bank and the Inter-American Development Bank, with their generous array of salaries, fringe benefits (including the legal and other costs of this litigation (4th Cir. Brief for Appellees at 17)), and dependency allowances (*see* Foreign Assistance and Related Programs Appropriation Bill, 1978, H.R. Rept. 95-417, 95th Cong., 1st Sess., at 46-47 (June 15, 1977)), are unable to pay the differential. More importantly, at least for employees at the World Bank (and perhaps for those of the Inter-American Development Bank as well), neither the students nor their parents need to pay the differential at all, because the bank itself pays it in the form of a "tuition equalization subsidy." A. 41A-43A.

Finally, no great hardship is entailed if one of respondents adjusts his immigration status to obtain the in-state tuition rate, because at some point, as a non-immigrant visa holder, he will have to make that

[8] Respondents' argument in this regard is not advanced by the existence of an in-state appeal mechanism at the University, because a similar device capable of providing individual determinations existed in Massachusetts Board of Retirement v. Murgia, *supra.*

adjustment to stay in the country.[9] Moreover, under rational basis scrutiny only one answer to respondents' claim of alleged hardship is possible:

> We may assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential . . . . [A]ny line must produce some harsh and apparently arbitrary consequences. . . .

*Mathews v. Diaz, supra* at 83.

## III.

### THE UNIVERSITY'S APPLICATION OF ITS IN-STATE POLICY TO THE INTERNATIONAL BANK STUDENTS DOES NOT DISCRIMINATE AGAINST A "SUSPECT CLASS" AND IS RATIONALLY SUPPORTED BY IMPORTANT STATE INTERESTS.

Neither the district court nor the court of appeals decided respondents' claim that the University's in-state policy unconstitutionally discriminated against them in violation of the equal protection clause. Nevertheless, they press the issue here. They argue for a mechanistic application of "strict scrutiny" equal protection review based upon the notion that the challenged classification affects a "suspect class," namely, aliens. This is not the case, however. The international bank students are not *resident* aliens like the plaintiffs in the alienage decisions of this Court (*see*

[9] Throughout their brief, the international bank students conjure up difficulties in connection with the adjustment of their status from nonimmigrant to permanent resident alien. Foremost is the contention that the banks' own interpretation of their own loosely worded agreements "except in very exceptional circumstances" bars the banks from making the labor certification sometimes needed for adjustment to immigrant status. Brief for Respondents at 8. Such imaginary roadblocks cannot bear scrutiny. Moreover, a bank employee need not adjust his status and face the alleged spectre of loss of employment if the child who seeks to attend the University contributes more than half of his own support and as, one of respondents did in this case, adjusts to immigrant status.



*Nyquist v. Mauclet,* 432 U.S. 1 (1977); *Graham v. Richardson,* 403 U.S. 365 (1971)), and for whom this Court has shown a high level of solicitude. *See Nyquist v. Mauclet, supra* at 12 ("Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. . . . The State surely is not harmed by providing resident aliens the same educational opportunity it offers to others"). In fact, permanent resident aliens can and do qualify for preferential tuition rates under the University's in-state policy on the same bases as citizens.

The classification at issue here is not between aliens and citizens. In terms of the benefit denied by the classification, it is predicated essentially on domicile with aliens on both sides of the classification.

Nondomiciliaries, a group consisting of out-of-state citizens and nonimmigrant aliens, are denied the preferential tuition while Maryland domiciliaries, who are citizens and permanent resident aliens, enjoy those benefits. Respondents argue that they are treated differently than out-of-state citizens in that the latter are free to exhibit the necessary domiciliary criteria to enable them to qualify. Such reasoning begs the question, however. Out-of-state citizens can no more qualify for the benefit than nonimmigrant aliens. The international bank students in the present case were permitted access to the University's appeals mechanism just as would be the case for an out-of-state citizen. But regardless of the opportunity to present evidence of domicile, the end result in terms of the benefit sought would be the same for both. Indeed, the policy similarly denies this benefit to some citizens whose financial contributions to the State can also be expected to be of limited significance and duration, specifically, those members of the military assigned to the University for educational purposes. Brief of Petitioner at 7.

Even if the classification at stake here were viewed as one between nonimmigrant aliens and permanent resident aliens, *Mathews v. Diaz*, 426 U.S. 67 (1976), would support its validity. In that case, this Court upheld the denial of Medicare benefits to nonimmigrants upon application of a rational basis equal protection standard. In so doing, the Court noted that the only reason state exclusion of *some* aliens could not be justified is because the State invariably treated out-of-staters and aliens differently. 426 U.S. at 85. The University's in-state policy does not suffer from such a defect in that *both* out-of-staters and nonimmigrants are denied the benefit.[10]

Respondents rely primarily on *Nyquist v. Mauclet*, *supra*, to support their contention that strict scrutiny is the equal protection standard to gauge the University of Maryland's in-state policy. The scheme condemned in *Mauclet*, however, denied scholarships to permanent resident aliens and harmed only aliens. Unlike the scheme in *Mauclet*, the University's policy does not coerce aliens to abandon that status and become citizens but merely premises its award of the benefit on some level of attachment and liability for contribution to the State to warrant the award of the benefit. The University denies preferential tuition rates to both out-of-state citizens and nonimmigrants and confers that benefit upon permanent resident aliens and other state residents. Moreover, in dicta in *Mauclet*, the Court suggested that New York could deny educational benefits to nonimmigrants who "may be precluded by

[10] Nor is Graham v. Richardson, 403 U.S. 365 (1971), applicable. At issue there was the absolute deprivation to permanent resident aliens of vital necessities of life, *viz.*, welfare benefits. And it would be ludicrous to analogize the 15 year durational requirement challenged in that case to an adjustment of immigration status to permanent resident alien which demands no set waiting period and which is required of an alien anyway to stay in this country permanently.



federal law from establishing a permanent residence in this country." *Id.* at 4. Additionally, unlike the resident alien scholarship applicants in *Mauclet*, who might legitimately make the claim that to deny them a scholarship is to deny them an education, respondents are only denied a dollar differential which they are more than able to pay (and apparently do not pay at all). *See supra* at 11. Finally, aliens as a class are characterized by a factor beyond control, *viz.*, the lengthy waiting period which the law requires before citizenship; but nonimmigrants who wish to stay in the country permanently must make the decision to adjust their status to permanent resident alien, and, as noted above, no waiting period is required for the adjustment. The international bank students are hardly the apprppriate group to contend that nonimmigrants are saddled with such disabilities and powerlessness as to qualify as a suspect class deserving of special protection (*see San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 24 (1973)), particularly where they claim a preferred position among aliens. Brief for Respondents at 36.

If "strict scrutiny" is not the standard to apply to respondents' equal protection contention, the challenged classification must be gauged by the rational basis test. As the University has demonstrated (Brief of Petitioner at 29-33), the in-state policy bears a rational relationship to the University's purpose of limiting its expenditures, achieving cost equalization between nonresidents and residents, efficiently administering the in-state determination and appeals process, and preventing disparate treatment among categories of nonimmigrants with respect to tuition and fee differentials.

## IV.

### THE UNIVERSITY'S IN-STATE POLICY DOES NOT VIOLATE THE SUPREMACY CLAUSE.

Respondents' argument that the University's policy violates the supremacy clause was not raised in their district court complaint (A. 3A-11A), nor briefed in the court of appeals. And neither court deigned to decide the point. For these reasons this Court could refuse to decide the question.

Even if the claim were properly before the Court, however, it would be without merit. In *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 605-06 (1976), this Court noted:

> We do not suggest . . . that a State, Territory, or local government, or certainly the Federal Government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens.

And in *DeCanas v. Bica,* 424 U.S. 351, 355 (1976), the Court stated:

> [We have] never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised. . . . [S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.

Petitioner submits that under these principles the question of how a public university defines domicile so as to govern eligibility for preferential tuition benefits falls into permissible regulation.



Unlike the situation in *Graham v. Richardson,* 403 U.S. 365 (1971), where stringent state residency requirements denied welfare benefits to permanent resident aliens, literally forcing them out of the country, the University's in-state policy has no effect on the admission of aliens into the United States. In addition, the policy does not affect "the conditions under which a legal entrant may remain," *DeCanas v. Bica, supra* at 355, because nonimmigrants could not permanently remain in this country in any event unless they adjusted their status to permanent resident alien. All that is at issue here is a dollar differential which the international bank aliens (or more properly, perhaps, their employing banks) are perfectly able to pay.

## CONCLUSION

In summary, Petitioner contends that neither the due process, the equal protections nor the supremacy clause mandates the invalidation of the University's in-state policy for its treatment of nondomiciliaries who are not permanent resident aliens. For these reasons, and for those appearing in the Brief of Petitioner and the Brief of the American Council on Education, the Commonwealths of Kentucky, Massachusetts, and Virginia, and the States of Alaska, Connecticut, Delaware, Georgia, Idaho, Indiana, Louisiana, Maine, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming as Amici Curiae in Support of Petitioner, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and *Vlandis v. Kline,* 412 U.S. 441 (1973), should be overruled.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
ROBERT A. ZARNOCH,
Assistant Attorney General,
1400 One South Calvert Building,
Baltimore, Maryland 21202,
Attorneys for Petitioner.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,

*Respondents.*

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, AND VIRGINIA, AND THE STATES OF ALASKA, CONNECTICUT, DELAWARE, GEORGIA, IDAHO, INDIANA, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER**

*(See inside cover for counsel)*

SHELDON ELLIOT STEINBACH
1 DuPont Circle, N.W.
Suite 824
Washington, D. C. 20036
Attorney for the American
Council on Education

ROBERT F. STEPHENS
Attorney General of Kentucky
State Capitol
Frankfort, Kentucky 40601
Attorney for the
Commonwealth of Kentucky

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108
Attorney for the
Commonwealth of Massachusetts

ANTHONY F. TROY
Attorney General of Virginia
Supreme Court — Library Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

AVRUM GROSS
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
Attorney for the
State of Alaska

CARL R. AJELLO
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for the
State of Connecticut

RICHARD R. WIER, JR.
Attorney General of Delaware
Department of Justice
12th and Market Streets
Wilmington, Delaware 19801
Attorney for the
State of Delaware

ARTHUR K. BOLTON
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
Attorney for the
State of Georgia

WAYNE L. KIDWELL
Attorney General of Idaho
State Capitol
Boise, Idaho 83720
Attorney for the
State of Idaho

THEODORE L. SENDAK
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
Attorney for the
State of Indiana

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112
Attorney for the
State of Louisiana

JOSEPH E. BRENNAN
Attorney General of Maine
State House
Augusta, Maine 04330
Attorney for the
State of Maine

A. F. SUMMER
Attorney General of Mississippi
Department of Justice
State Capitol
Jackson, Mississippi 39205
Attorney for the
State of Mississippi

JOHN D. ASHCROFT
Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101
Attorney for the
State of Missouri

PAUL L. DOUGLAS
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509
Attorney for the
State of Nebraska

ROBERT LIST
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701
Attorney for the
State of Nevada

DAVID H. SOUTER
Attorney General of New Hampshire
State House Annex
Concord, New Hampshire 03301
Attorney for the
State of New Hampshire

WILLIAM F. HYLAND
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
Attorney for the
State of New Jersey

TONEY ANAYA
Attorney General of New Mexico
Supreme Court Building
P. O. Box 2246
Santa Fe, New Mexico 87501
Attorney for the
State of New Mexico

LOUIS J. LEFKOWITZ
Attorney General of New York
#2 World Tade Center
New York, New York 10047
Attorney for the
State of New York

*(See inside back cover for additional counsel)*

# INDEX

## TABLE OF CONTENTS



## TABLE OF CITATIONS

### *Cases*

***Miscellaneous***

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

*Petitioner,*

v.

JUAN CARLOS MORENO, ET AL.,

*Respondents.*

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, AND VIRGINIA, AND THE STATES OF ALASKA, CONNECTICUT, DELAWARE, GEORGIA, IDAHO, INDIANA, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER**

## INTERESTS OF AMICI

The interests of amici and their reasons for urging this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit in *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977), *aff'g*, 420 F. Supp. 541 (D. Md. 1976), are as follows:

Amici are states and the nation's foremost association of colleges and universities. All are vitally concerned with preserving a rational system of tuition rate assignments for students in publicly-supported colleges and universities in order to ensure the fiscal integrity of these institutions.

Amici maintain that proper application of constitutional principles warrants overruling the irrebuttable presumption doctrine of *Vlandis v. Kline,* 412 U.S. 441 (1973), which has been used as a mechanism for striking down countless state legislative judgments.

## QUESTIONS PRESENTED

I. Whether strict judicial scrutiny, in the guise of an irrebuttable presumption analysis which is inconsistent with traditional constitutional analysis and financially deleterious to public colleges and universities, must be applied to a rationally based in-state and out-of-state tuition policy such as that of the University of Maryland and of the great majority of public institutions of higher education in the United States?

II. Whether recent decisions of this Court have so eroded the irrebuttable presumption doctrine embodied in *Vlandis v. Kline,* 412 U.S. 441 (1973), that this Court should now declare that doctrine overruled?

## ARGUMENT

### THE IRREBUTTABLE PRESUMPTION DOCTRINE SHOULD BE REJECTED AS A TOOL TO GAUGE GOVERNMENT CLASSIFICATIONS.

The lower court decisions attacked by Maryland hold that the University of Maryland's policy of denying in-state status to non-immigrant aliens creates an irrebuttable presumption violative of the due process clause of the fourteenth amendment.



As one recent commentator has noted, "it is difficult to recall any doctrine utilized by the [Supreme] Court in recent years which has met with such a degree of antipathy as has the irrebuttable presumption/procedural due process analysis." J. Chase, *The Premature Demise of Irrebuttable Presumptions,* 47 U. Colo. L. Rev. 653 (1976). With its roots in cases decided in the heyday of substantive due process analysis,[1] the doctrine lay dormant for nearly 40 years, as this Court reestablished the line between legislation and adjudication and removed from judicial inquiry the subject of the wisdom of legislation. When the doctrine reappeared in the early seventies, the first results reached were neither startling nor inconsistent with those reached through more traditional methodologies. In *Bell v. Burson,* 402 U.S. 535 (1971), the Court held that Georgia must afford a driver a hearing on fault or liability before suspending his license, a result consistent with procedural due process requirements when a "liberty" interest such as the right to pursue a livelihood is impaired; and in *Stanley v. Illinois,* 405 U.S. 645 (1972), a presumption that an unwed father was unfit to have custody of his children was struck down primarily because the challenged legislative scheme affected basic civil rights such as fatherhood.[2]

However, in *Vlandis v. Kline,* 412 U.S. 441 (1973), constitutional theory was set on its head as "strict judicial scrutiny" in the guise of the irrebuttable presumption due process doctrine was used to invalidate a concededly rationally based state classification. Despite the fact that the Connecticut in-state tuition scheme challenged in *Vlandis* created no "property" interest for out-of-state students, *Bishop v. Wood,* 426

[1] Heiner v. Donnan, 285 U.S. 312 (1932); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). In *Schlesinger,* Mr. Justice Holmes in dissent leveled the first blast of criticism at the doctrine.

[2] *Stanley* was decided below and argued in this Court on equal protection grounds.

U.S. 341 (1976), and implicated no "liberty" interest, *see Memorial Hospital v. Maricopa County,* 415 U.S. 250, 260 n.15 (1974), due process was said to require individual determination of in-state status for students. And despite the fact that no constitutionally protected interest was at stake in *Vlandis,* the majority rejected all rational interests proffered in support of the challenged classification, to the point of requiring the State, in the language of "strict scrutiny," to employ the least restrictive alternative to further its ends.

In a prophetic dissenting opinion, Chief Justice Burger expressed dissatisfaction with the irrebuttable presumption doctrine:

> There will be, I fear, some ground for a belief that the Court now engrafts the "close judicial scrutiny" test onto the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions." But literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred "permanently and irrebuttably" from pursuing his calling, without ever having an opportunity to prove his personal skills. The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area. Can this be what we are headed for?

412 U.S. at 462.



Such fears proved well grounded, as *Vlandis* spawned numerous lower court decisions featuring unprincipled constitutional analysis. *See, e.g., Gurmankin v. Costanzo,* 556 F.2d 184 (3d Cir. 1977) (school district medical and personnel policy preventing blind persons from teaching sighted students in public schools invalidated); *Berger v. Board of Psychological Examiners,* 521 F.2d 1056 (D.C. Cir. 1975) (requirement of graduate degree invalidated as qualification for professional competence); *Hein v. Burns,* 402 F. Supp. 398 (S.D. Iowa, 1975), *rev'd sub nom., Knebel v. Hein,* 429 U.S. 288 (1977) (food stamp regulation disallowing a deduction from net income for federal job training travel allowance held by district court to violate due process); *Salfi v. Weinberger,* 373 F. Supp. 961 (N.D. Cal. 1974), *rev'd sub nom., Weinberger v. Salfi,* 422 U.S. 749 (1975) (nine-month duration of relationship with deceased wage earners as requirement for survivors' eligibility for social security benefits found unconstitutional by district court); *Turner Elkhorn Mining Co. v. Usery,* 385 F. Supp. 424 (E.D. Ky. 1974), *rev'd,* 428 U.S. 1 (1976) (statutory presumption that affliction with black lung disease resulted in miners' total disability struck down by district court).

The advent of *Vlandis* also brought with it reams of critical legal commentary. Students of constitutional law found in the *Vlandis* irrebuttable presumption doctrine a confusion of procedural and substantive due process, Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?,* 72 Mich. L. Rev. 800, 823 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis,* 27 Stan. L. Rev. 449, 461 (1975); a poor substitute for equal protection analysis, 72 Mich. L. Rev. 800, 829, 27 Stan. L. Rev. 449, 465; and a rejection of legislation by classification, Comment, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine,* 7 Ind. L. Rev. 644, 655 (1974).

Since *Vlandis* this Court has applied the doctrine selectively — only in cases where constitutionally protected interests were at stake, *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Turner v. Department of Employment Security,* 423 U.S. 44 (1975); or where the classification at issue utterly lacked a rational basis, *United States Department of Agriculture v. Murry,* 413 U.S. 508 (1973). Like pre-*Vlandis* irrebuttable presumption cases, these decisions could have been reached employing more traditional methods of constitutional analysis. And since 1975 this Court has not struck down a single state law on the basis of the irrebuttable presumption doctrine. Instead, the Court has rejected application of the doctrine in six cases. *Weinberger v. Salfi,* 422 U.S. 749 (1975); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976); *Murgia v. Massachusetts Board of Retirement,* 427 U.S. 307 (1976); *Knebel v. Hein,* 429 U.S. 288 (1977); *Skafte v. Rorex,* 430 U.S. 961 (1977); *Fiallo v. Bell,* 430 U.S. 787 (1977).[3]

As the dissenters in *Weinberger v. Salfi,* 422 U.S. at 802-03, and legal commentators have noted, 47 U. Col. L. Rev. 653, little was left of *Vlandis* after the *Salfi*

[3] Most recently, in *Califano v. Jobst,* 46 U.S.L.W. 4004 (U.S., Nov. 8, 1977), this Court unanimously reversed a lower court judgment striking down a statute terminating Social Security Act benefits upon the marriage of a disabled child beneficiary. In so doing, this Court said:

> "Instead of requiring individualized proof on a case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency. A child who is married or over 18 and neither disabled nor a student is denied benefits because Congress has assumed that such a child is not normally dependent on his parents. There is no question about the power of Congress to legislate on the basis of such factual assumptions. General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases. *Weinberger v. Salfi,* 422 U.S. 749, 776."

*Id.* at 4006.



decision. At that time a majority of this Court refused to allow the irrebuttable presumption doctrine to become "a virtual engine of destruction for countless legislative judgments" and reestablished rational basis analysis as the method for gauging classifications not affecting fundamental rights. *Id.* at 772.

Amici urge this Court to reaffirm the principles enunciated in *Salfi* and the line of cases that have followed it and to reject *Vlandis* as an aberration in constitutional law.

The instant case reflects application of an irrebuttable presumption analysis at its worst. Maryland must grant a privilege otherwise available only to taxpaying domiciliaries to a class of aliens precluded by federal law from establishing permanent residence (and not required to pay taxes). Yet the decision of this Court in *Nyquist v. Mauclet,* ___ U.S. ___, 53 L. Ed. 63 (1977), would appear to allow Maryland to deny scholarship assistance to a class of persons in non-immigrant status. Similarly, Maryland, acting under the Social Security Act, could elect to deny state-funded medical benefits to non-immigrant aliens under the decision of this Court in *Mathews v. Diaz,* 426 U.S. 67 (1976).

The line drawn by Maryland between non-immigrants and immigrants for purposes of in-state/out-of-state classification is predicated on a reasonable interpretation of the law of domicile and is supported by past decisions of this Court. *Mathews v. Diaz, supra; Nyquist v. Mauclet, supra.* Moreover, the interests asserted by the State to justify the classification meet the test of rationality set forth in *Salfi.* As Maryland has demonstrated, the in-state policy bears a rational relationship to the University's purpose of limiting its expenditures, efficiently administering the in-state determination and appeals process, and preventing disparate treatment among categories of non-immigrants with respect to tuition and fee differentials.

*Knebel v. Hein, supra; Weinberger v. Salfi, supra; Mathews v. Diaz, supra;* and *Starns v. Malkerson,* 401 U.S. 985 (1971).

Thus, it is evident that this case raises issues of great importance to states and particularly to their public colleges and universities. The difference between the tuition paid by resident students and those enrolling from out of state represents a vital source of income to these institutions. Nearly five years ago that income was estimated at between $250 and $300 million a year for just 400 public four-year colleges and universities belonging to the National Association of State Universities and Land Grant Colleges and the American Association of State Colleges and Universities. W. Waugh, *Is Out-of-State Tuition Legal?,* 4 Change 22 (Winter 1972-73). Time and inflation have heightened dependency on that income. *Vlandis v. Kline, supra,* held that due process mandated an individualized determination of a student's status and pointed to domicile as a reasonable standard for determining the residential status of a student.

After *Vlandis,* public colleges and universities predicated their tuition policies on student domicile and established elaborate and expensive appeal mechanisms to afford students the individualized determinations they believed to be mandated by this Court. Viewed in the short run, the *Vlandis* decision may have aided a few students deserving of preferential tuition; however, viewed more realistically, the 1973 ruling opened the door to many students who lack even minimal affinity to the states which bear the financial brunt of their education.

In the present case, the lower courts took *Vlandis* one step further by striking down a rational tuition system based on domicile. The decisions below question a public university's ability to adopt a reasonable



determination of domicile consistent with state law, common sense, and decisions of this Court.

## CONCLUSION

Because of the deleterious effect of *Vlandis* on a host of state legislative judgments, including rationally based tuition policies of public colleges and universities, and in light of the importance of discarding the irrebuttable presumption doctrine, amici urge that the Court reverse the judgment below of the United States Court of Appeals for the Fourth Circuit, and that in so doing the Court overrule *Vlandis v. Kline, supra.*

Respectfully submitted,

SHELDON ELLIOT STEINBACH
1 DuPont Circle, N.W.
Suite 824
Washington, D. C. 20036
Attorney for the American Council on Education

ROBERT F. STEPHENS
Attorney General of Kentucky
State Capitol
Frankfort, Kentucky 40601
Attorney for the Commonwealth of Kentucky

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108
Attorney for the Commonwealth of Massachusetts

ANTHONY F. TROY
Attorney General of Virginia
Supreme Court — Library Building
Richmond, Virginia 23219
Attorney for the Commonwealth of Virginia

AVRUM GROSS
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
Attorney for the State of Alaska

CARL R. AJELLO
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for the State of Connecticut

RICHARD R. WIER, JR.
Attorney General of Delaware
Department of Justice
12th and Market Streets
Wilmington, Delaware 19801
Attorney for the State of Delaware

ARTHUR K. BOLTON
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
Attorney for the State of Georgia

WAYNE L. KIDWELL
Attorney General of Idaho
State Capitol
Boise, Idaho 83720
Attorney for the State of Idaho

THEODORE L. SENDAK
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
Attorney for the State of Indiana

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112
Attorney for the State of Louisiana

JOSEPH E. BRENNAN
Attorney General of Maine
State House
Augusta, Maine 04330
Attorney for the
State of Maine

A. F. SUMMER
Attorney General of Mississippi
Department of Justice
State Capitol
Jackson, Mississippi 39205
Attorney for the
State of Mississippi

JOHN D. ASHCROFT
Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101
Attorney for the
State of Missouri

PAUL L. DOUGLAS
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509
Attorney for the
State of Nebraska

ROBERT LIST
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701
Attorney for the
State of Nevada

DAVID H. SOUTER
Attorney General of New Hampshire
State House Annex
Concord, New Hampshire 03301
Attorney for the
State of New Hampshire

WILLIAM F. HYLAND
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
Attorney for the
State of New Jersey

TONEY ANAYA
Attorney General of New Mexico
Supreme Court Building
P. O. Box 2246
Santa Fe, New Mexico 87501
Attorney for the
State of New Mexico

LOUIS J. LEFKOWITZ
Attorney General of New York
#2 World Trade Center
New York, New York 10047
Attorney for the
State of New York

RUFUS L. EDMISTEN
Attorney General of North Carolina
Justice Building
P. O. Box 629
Raleigh, North Carolina 27602
Attorney for the
State of North Carolina

ALLEN I. OLSON
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58501
Attorney for the
State of North Dakota

JAMES A. REDDEN
Attorney General of Oregon
100 State Office Building
Salem, Oregon 97310
Attorney for the
State of Oregon

DANIEL R. McLEOD
Attorney General of South Carolina
Hampton Office Building
Columbia, South Carolina 29211
Attorney for the
State of South Carolina

WILLIAM JANKLOW
Attorney General of South Dakota
State Capitol
Pierre, South Dakota 57501
Attorney for the
State of South Dakota

ROBERT B. HANSEN
Attorney General of Utah
State Capitol
Salt Lake City, Utah 84114
Attorney for the
State of Utah

M. JEROME DIAMOND
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602
Attorney for the
State of Vermont

CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia
State Capitol
Charleston, West Virginia 25305
Attorney for the
State of West Virginia

V. FRANK MENDICINO
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82001
Attorney for the
State of Wyoming